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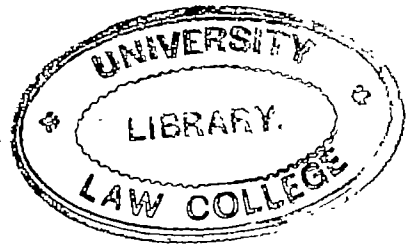
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LAW JOURNAL

UNIVERSITY COLLEGE OF LAW

CALCUTTA

The Golden Jubilee Volume



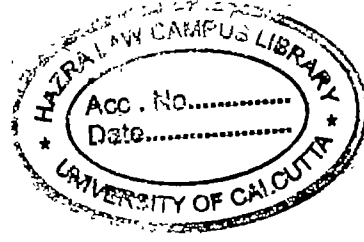
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“उत्तिष्ठत जाग्रत प्राप्य वरान्निबोधत” ।

“Arise, Awake ! and stop not till the Goal is reached.”

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S. R. Das

Messages and Blessings

*Vice-President's Secretariat,
New Delhi.
April 11, 1959.*

Dear Sir,

Thank you for your letter of the 6th April, 1959.

I send my best wishes for the success of your endeavours.

Yours faithfully,
Sd.- S. RADHAKRISHNAN.

The Editor,
Calcutta University College of
Law Magazine,
Darbhanga Building,
College Street,
Calcutta-12.

*Judge, Supreme Court,
India.
34, Aurangzeb Road,
New Delhi.
The 26th February, 1959.*

My dear Majumdar,

I wish I could comply with your request about contributing an article to your magazine on the occasion of the Golden Jubilee of the College. It is impossible however in view of the pressure of work to spare time for that. I am sorry if this is a disappointment. I am sure the coming issue of the magazine will be a great success and you will have interesting articles from many others more fitted for the work than me.

With all good wishes,

Yours sincerely,
Sd.- A. K. SARKAR.

*High Court of Mysore,
Bangalore-1.*

Dated: 18th February, 1959.

The Editor,
University College of Law Magazine,
The University College of Law Union,
Darbhanga Building,
Calcutta-12.

Dear Sir,

Your letter of 5th February 1959.

I am very happy to learn that you would soon bring out your Magazine, as a volume commemorating the Golden Jubilee of your College.

I am very sorry that I am unable, on account of pressure of work, to send any article for publication. But, I sincerely wish all success for your Union in bringing out the Golden Jubilee Publication of your Magazine which should certainly be of immense use to its readers.

Yours sincerely,
Sd./- S. R. DAS GUPTA.

*Attorney General,
India.*

1, Race Course Road,
New Delhi.
February 17, 1959.

Dear Shri Majumdar,

I have your letter of the 5th of February 1959.

I regret I will not be able for want of time to contribute an article to your magazine commemorating the Golden Jubilee of your College.

However, I wish your Golden Jubilee number complete success. More than ever before, those receiving a training in law require to be more and more mindful of their duties and responsibilities in the changed and changing phases of our country.

Yours sincerely,
Sd./- M. C. SETALVAD.

Shri Madhusudan Majumdar,
Editor, University College of Law Magazine,
University College of Law Union,
Calcutta-12.

*Solicitor General,
India.*

3, Hastings Road,
New Delhi.

20th February, 1959.

THE EDITOR,
University College of Law Magazine,
Darbhanga Building,
Calcutta-12.

Sir,

I have to thank you for your letter of 5th February 1959 and appreciate the honour done me in asking to write an article for your magazine.

Unfortunately, at present there is a pressure of continuous work and I cannot find the time necessary for preparing an article meet for the occasion. Perhaps, later on, I shall be able to attribute in some way to your magazine to which I wish all success.

Yours faithfully,

Sd.- C. K. DAPHTARY,
Solicitor General of India.

Foundation of the University Law College

By

DR. P. N. BANERJEE, M.A., B.L., D.LITT., LL.D., BAR-AT-LAW,

Vidya-Vachaspati.

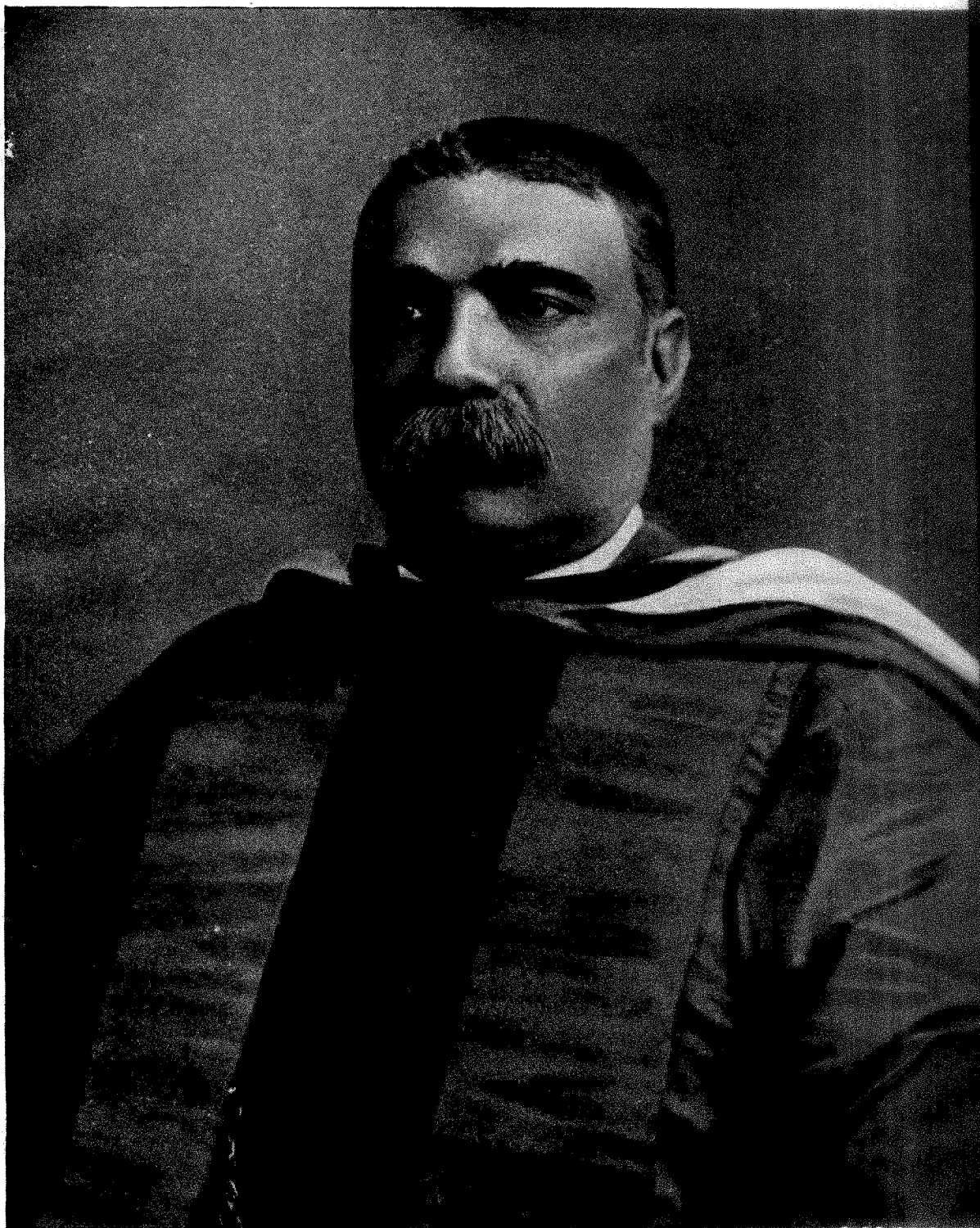
The first step towards the establishment of what Asutosh described in his famous Convocation Address of 1908 as "the new University of Calcutta", was taken when under his leadership the Senate of the University decided to establish the University Law College. Law was Asutosh's first love. The example of Dwarkanath Mitra, senior, who left an imperishable name as Judge of the High Court of Calcutta, inspired Asutosh to the same aspiration. After the passage of the Universities Act of 1904, Asutosh Mookerjee, it is said, was persuaded by Curzon to believe that the Vice-Chancellorship of Calcutta University would come to him after Pedler, if he accepted a seat on the Bench of the Calcutta High Court. In March 1904, Asutosh Mookerjee was appointed a Judge of the Calcutta High Court. He retained his seat on it for twenty years and retired on 2nd January, 1924. For sometime he acted as the Chief Justice of that Court.

Wood's Education Despatch of 1854 explicitly stated "it would be advisable to establish in connection with the Universities, Professorships in various branches of learning" for acquisition of which facilities then did not exist and added that "the most important of those branches was law." This, Asutosh stated before a meeting of the Senate on 24 July, 1908, was the position in 1854. For more than half a century the idea of establishing the study of law on a scientific basis was only a dream. The University of Calcutta was founded in 1857; twenty-two years before, in 1835, the Calcutta Medical College had been born. The Civil Engineering College was born in 1856. For five years this college was attached as an appendage to the Presidency College, Calcutta, but it was eventually shifted to its own premises at Sibpur on the Ganges.

In a minute written by Asutosh Mookerjee for the Syndicate of the University, he stated:

"The branch of our education system which stands in need of the most urgent and radical reform is that concerned with the teaching of law for our degree examinations. It is a noteworthy fact that we have not got a single college devoted entirely to the study of Law as we have in the cases of Medicine and Engineering."

The history of the teaching of law in this University has been clearly set out in that minute. When the University was founded in 1857, law classes were attached to the Presidency College. In 1864 the Government decided to attach law classes to the Government colleges at Hooghly, Dacca, Krishnagar, Berham-



Born—29th June, 1864

Died—25th May 1924

*"Law was neither a trade nor a solemn jugglery but a living science
in the proper sense of the word."*

—SIR ASUTOSH MOOKERJEE

pore and Patna. In 1869, law classes were added to the colleges at Cuttack and Chittagong. In 1880, such classes were attached to the college at Rajshahi. All these law classes had no independent existence. They were subordinate to the Arts colleges owned and managed by the Government. In 1882, private enterprise attached law classes to private colleges, and the process started with the then Metropolitan Institution; next year the City College followed suit. Asutosh himself was a student of the City College in its law department. In 1885, the then Ripon College was granted affiliation in law by the University. The Bangabasi College, Calcutta, sought and also obtained affiliation in law. Apart from these law classes in the city of Calcutta there were in 1896, six colleges in the districts, affiliated in law. These were the colleges at Cooch-Behar, Bhagalpur, Midnapore, Bankipur, Barisal and Rangoon. In 1908, there were in the University eighteen colleges with affiliation in law. The teachers in most of these colleges were men of distinction. But law students suffered from lack of aim and ideal. The teaching staff was wholly insufficient for the purpose of meeting the requirements of the new regulations. These regulations effected considerable improvement upon the study of law for the law examinations of the University. It was stated in the minute of Asutosh Mookerjee that there was a college affiliated in law in one of the districts where there was only one pupil. That pupil paid a monthly fee of Rupees five only. The teacher who was supposed to lecture on all the subjects of study for the law examinations, was paid his honorarium out of this sum of Rupees five a month. Law libraries did not exist in these colleges.

The Government of the then Bengal as also the then Government of Eastern Bengal and Assam decided to close all law classes attached to the Government colleges in these provinces, and to have instead two law schools, one at Dacca and the second at Patna. In or about 1908, the Bangabasi College intimated to the University its decision to close down the law classes. The City College and the Metropolitan Institution were not anxious to continue their law classes either. The Ripon College alone desired continuance of its classes. The classes attached to private colleges in the districts were all closed down by 1908. Asutosh was anxious to establish a law college in Calcutta like the law colleges in Madras, Bombay and Allahabad. These law colleges were then all owned and managed by the Government. The law college in Calcutta was to be a University Law College. It was to be a model law college and was to be constituted as *bona fide* centre of legal education. Asutosh Mookerjee's minute was in conformity with the principles enunciated by the resolution of the Government of India, of 24 October, 1902. His minute was considered by the Syndicate at their meeting on July 4, 1908, when the following resolution was adopted: "The Syndicate recommended to the Senate that a University Law College be established and the Syndicate be authorised to appoint a provisional committee to organise it." On July 14, 1908, the minute was considered by the Faculty of Law at a special meeting, and the Faculty adopted the following resolution: "That the Faculty do record its opinion that for the promotion of legal education of students for degrees in law, it is desirable to establish a University Law College to serve as a model, but not so as to create a monopoly either general or local." Notwithstand-

ing the fact that legal education was not for nearly half a century placed on a scientific basis, powerful interests and strong traditions were unnecessarily restless. At a meeting of the Senate held on 21 July, 1908, Asutosh Mookerjee as Vice-Chancellor, moved the adoption of two resolutions. The meeting was very largely attended. Surendranath Banerjea was present at the meeting. It was presided over by Andrew Fraser, the Rector of the University. Under the regulations, the Vice-Chancellor of the University has to maintain the non-partisan character of an impartial Speaker when presiding at a meeting of the Senate. It was expected that a great controversy would ensue, and therefore, the Vice-Chancellor vacated his Chair and the Rector presided. Asutosh Mookerjee moved before the Senate:

- “(a) That the University Law College be established and that the Syndicate be authorised to appoint a provisional committee to organise it.
 (b) That with a view to avoid misconception, it be recorded that in establishing a University Law College the University does not wish to deviate from the principle enunciated in the resolution of the Government of India dated the 24th October, 1902; the College is to be established for the promotion of legal education of students for degrees in law and to serve as a model college and not with a view to create a monopoly either general or local.”

In the course of his speech, Asutosh confidently declared “that law was neither a trade nor a solemn jugglery but a living science in the proper sense of the word.” He pointed out that the Government of the United States of America had prepared a survey of the Condition of the legal education in the different universities of the world. The survey included details about all European countries, America, Japan and China. It contained no reference to India. The Vice-Chancellor stated: “Fortunately” for us, “if the Calcutta University system of law teaching had been described they would have stood branded for all time.” The resolution was carried unanimously. The University Law College started functioning from July, 1909. The Law College was placed under the management of a Governing Body consisting of sixteen members with the Vice-Chancellor as President *ex-officio*. S. C. Bagchi became the first Principal of the College. He was a scholar of eminence and jurist of reputation. In 1912, Birajmohan Majumdar was appointed the first Vice-Principal of the college. The first professors and assistant professors appointed for the Law College were:

Professors: Golapchandra Sarkar Sastri, Haradhan Nag, Harendranath Sen;
Assistant Professors: Subodhchandra Ray, Nirmalchandra Sen, Abdullah-al-Mamun Suhrawardy, Jyotiprasad Sarbadhikari, Haraprasad Chatterjee, Asutosh Mookerjee, Birajmohan Majumdar and N. N. Gupta.

The new regulations passed under the Act of 1904 instituted three law examinations, and insisted on a three years' course of study for the B.L. Examination. It prescribed the delivery of regular lectures to students. It made arrangements for holding tutorial classes. The novel feature which was introduced in the curricula of studies was the institution of the system of moot courts. Leading cases were prescribed for examinations in law and these cases were conducted in moot courts under the presidency of the professors of law. The system of holding

moot courts is known to England and also to the great schools of law like those attached to the Universities of Harvard and Yale. Asutosh Mookerjee himself presided over many of the moot courts and he also used to deliver lectures to the students.

The University Law College was first housed, as stated before, in a tiled hut in the compound of the University of today. The Law College had no finance excepting the revenues derived from the students. In 1909 the number of students studying in the college was 520. It, however, was fortunate in receiving from the Government of Bengal an annual sum of Rs. 3,500 for five years. It was still more fortunate in securing from the Government of India, the annual subvention of Rs. 20,000 which was subsequently raised to Rs. 30,000. Private enterprise came also to the aid of the Law College. Maharaja Manindrachandra Nandi of Cossimbazar not only agreed to the abolition of the law department from the Krishnath College, Berhampore, but also placed at the disposal of the University Law College the sum of Rs. 50,000 for the purpose of founding a number of scholarships for students of law at a competitive examination to be held by the college, with one condition that in cases of equal competence preference might be given to those who had graduated from the Krishnath College, Berhampore. Maharaja Prodyotcoomar Tagore made a gift to the college the sum of Rs. 10,000 towards the founding of a law library in connection with the Law College to be called after his father, Maharaja Jatindramohan Tagore. The only condition of the gift was that a life-size bronze bust of his late father Jatindramohan Tagore presented by him should be installed in the Law College Library. Jatindramohan Tagore was President of the Faculty of Arts in this University in 1881. His bronze statue decorates the library hall of the University Law College. Prodyotcoomar Tagore also presented to the college the entire library of valuable law books left by his grand-uncle Prosunno Coomar Tagore. Gooroodas Banerjee felt exultant when the Senate accepted the gift of two other great lawyers to this University—Taraknath Palit and Rashbehary Ghose. He invoked the aid of "Themis of law and wealth." The debt of the University of Calcutta to what Asutosh described as "the dreaded and the despised tribe of lawyers" is indeed very impressive. Private enterprise again came to the assistance of research in law in this University. Onauthnauth Dev, one of the landed aristocrats of the city, made a gift in 1912 of Rupees 25,000 for the foundation of a research prize. The recipients of the prize have considerably expanded the bounds of the knowledge of law in this University. The list of researchers includes distinguished names like those of Atulchandra Gupta and Bijankumar Mukherjee. Both of them were professors in the University Law College for years. The former is regarded as a well known scholar and advocate in Bengal; the latter sat as a Judge of the Calcutta High Court for years and then occupied the exalted position of a Judge of the Supreme Court of India under the new Constitution and rose to be its Chief Justice.

From out of the revenues of the University Law College another lectureship for research in law was established in 1925 to commemorate the memory of

Asutosh Mookerjee. It is called "the Asutosh Mookerjee Lectureship in Law." S. C. Bagchi, Principal of the University Law College, was the first lecturer. For more than thirty years no other lecturer has been appointed, and the funds originally contributed amounting to Rs. 20,000 (present value Rs. 68,700) are lying invested so that the interest on the accumulation might maintain a Chair in law.

As stated before, the University Law College was housed in the Darbhanga Library Building. Accommodation for the students of the Law College was, however, found in the hostel adjoining this building. In 1909 the Government of India made a grant of rupees six lakhs to the University for the construction of hostels for the students of colleges affiliated to the University. The request of the Syndicate to grant a sum of rupees one lakh for the construction of a hostel for the students of the University Law College out of this grant, was not complied with by that Government. In 1912, the University acquired a plot of land south of the Darbhanga Library Building, at a cost of rupees one lakh and fifty thousand, paid out of its reserve funds. The total approximate cost of the hostel for law students was four lakhs of rupees. The Government of India contributed three lakhs of rupees towards the cost. The gift of the Government was for the purpose of having a hostel for the Hindu students of the University Law College and also for the erection of an examination hall for holding University examinations. The Syndicate contemplated that the building when completed would accommodate the Registrar and two professors of the University Law College who would be in charge of the students. This purpose could not be effected due to lack of funds. The five-storeyed building standing on the Colootollah Street is called the University Law College Hardinge Hindu Hostel after the name of the then Chancellor of the University.

The services of the University Law College to the University and the country are not always realized. It is estimated that it contributed in diverse ways, to the University from 1909, the date of its foundation to 1956, the sum of Rs. 6,23,286-8-10. The sum of Rs. 20,000 out of the Rs. 30,000, the annual grant made by the Government of India to the University Law College has not since 1934-35 been spent by the University on the Law College, but is spent by the University itself. The University Law College has been, during the course of its existence for nearly half a century, the nursery of leaders of the bar and the judiciary of these provinces including the High Courts. This college has given to India its first President, Rajendra Prasad, who was at one time a professor of the University Law College. It has given to India two Chief Justices of the Supreme Court of India, Bijankumar Mukherjee and Sudhiranjan Das. Both of them were once professors of the University Law College. One of the members of the teaching staff, Pramatha Chaudhuri, became the leader of a new movement in Bengali literature: Prabhatkumar Mukhopadhyaya, another teacher, was a reputed short story writer and novelist.

EDITORIAL

PRACTICAL VERSUS SCIENTIFIC LEGAL STUDY IN INDIA

Legal education in India has recently become a controversial issue not only with respect to its aims and methods, but also in respect of its utility and effectiveness. In pre-independence days, legal study was mainly confined to the 'Practical' side alone to the exclusion of or in utter neglect of its 'theoretical' or 'scientific' aspect. It was intended to impart education on certain principles and provisions of law with the sole object of enabling the law students to start practice in law courts. Thus the legal institutions under the universities necessarily have become the teaching grounds for the would-be-practising lawyers for building their careers in the Bar or in the Bench. If the teaching of law is solely concentrated on or confined to meet the requirements of the practising lawyers, it results only in a lop-sided inchoate knowledge of law. Such legal teaching has intellectual value of a very limited nature because the first principles behind concrete or positive laws are being neglected. University teaching should be designed to convey legal understanding in its totality, and not for practical aspect alone. In this respect, Professor Eisenmann observes: "University teaching means scientific teaching—this is a universally accepted idea. By definition, teaching in the University sense regards its subject-matter as something from which knowledge, first and foremost, is to be derived—knowledge, disinterested knowledge, for its own sake; it aims at the total understanding of a series of facts or phenomena; it must therefore deal with all the problems which relate to those facts or phenomena and are essential to their comprehension. This is true of any subject-matter, and is therefore true of the teaching of *law*" (*Italic: mine*) [UNESCO Bulletin p. 55]. In India, neglect of legal study in its scientific aspect and over-emphasis on the professional aspect have hitherto affected the whole juridical field. The academic atmosphere in the law colleges is hardly satisfactory, and is at low ebb. There is a dearth of legal talents, research scholars and jurists, though we have many eminent and learned practitioners and judges. The observations of Radhakrishnan Commission deserve consideration in this respect:

"In our country, we have many eminent practitioners and excellent Judges. Some of these appeared before us as witnesses and made valuable comments and suggestions concerning the improvement of legal education. The law has also given us great leaders and men consecrated to public service. Most conspicuous of these is Gandhiji. Here the comparison ends. We have no internationally known expounders of Jurisprudence and legal studies. Our colleges of law do not hold a place of high esteem either at home or abroad nor has law become an arena of profound scholarship and enlightened research" (The Report of the University Education Commission Dec. 1948-Aug. 1949 p. 257). The Commission has also observed: "In Europe and America, legal education has long occupied a high niche

among the learned curricula. Products of the study of law have frequently risen to positions of distinction in public service or have amassed fortunes in the private practice of law or have acquired wide reputation as scholars without even entering practice. Legal education is on elevated plane and teachers of law enjoy a high respect, perhaps as high or higher than those of any other field of instruction. The names of Dicey, Pollock, Anson, Maine and Holdsworth of Oxford, as examples, are known wherever there is knowledge of law and jurisprudence. The same might be said of men like Roscoe Pound of Harvard University in America" (Vol. I. P. 257).

As greater stress was laid upon the professional aims of legal study, the legal institutions formulated curricula only to meet the needs of the would-be-practitioners. The system of a short and part-time study of law with morning or evening classes has facilitated the admission of not only a crowd of aimless and methodless young men who have half-hearted ambition to obtain an additional degree or to earn money as lawyers, if no other career is open to them, but also of the neophytes in legal profession who wished to supplement their meagre income from their profession. Major efforts of the practising lawyers-cum-teachers are devoted to their legal profession, and only in off-time they give tuition to the law-students. As a result, majority of such teachers cannot take much care or show much interest in teaching. Even amongst the students, a very small proportion engages itself in serious legal studies or researches, while a vast majority of them divert themselves in other branches of education or non-legal profession. They take up the law-course as a subsidiary one, and are not keen on the pursuit of their study. But this is not so in the U.S.A. or the U.K., where the law students have definite incentive for and interest in legal studies. In addition, there is no uniformity of legal study in India. Some are pre-graduate, while others are post-graduate courses. Bombay belongs to the former category while Calcutta and Madras fall in the other group. Besides, these institutions do not follow same syllabus. Consequently, the students migrating from one University to another encounter immense practical difficulties. All these have a detrimental effect upon the legal study in India, and affect the quality of learning in law.

Now, under the changed socio-politico-economic conditions of India, it is desirable and essential that improvement in the direction of legal study should take place. This will help India to find its place of prominence and importance amongst the independent and advanced countries.

It may be asked—what should be the aims or objects of teaching in law? Should it be confined to 'practical' or 'professional' aims alone, or be concentrated solely upon 'theoretical' or 'scientific' knowledge or, must we have a combination of the two? There is no reason why the two approaches—practical or scientific—cannot be combined. Can't it be possible to exercise the 'professional' use of 'scientific' knowledge or 'scientific' use of professional skill? On the contrary, the combination of the two approaches will help a practitioner to become a successful lawyer and a learned judge. It is not desirable that the teaching of law be confined to positive laws alone. The observation, in this respect, of Professor Eisenmann is worth for careful consideration:

"To have a scientific knowledge of law, to know law in the full philosophical meaning of the term, one needs—or would need—to have a complete knowledge of it, i.e. an intellectual grasp of every variety of element and phenomena, problem and relationship that is connected with or has any bearing on law and must be taken into account by the scientific—in the end result, general—theory of law. Law is, in the first place, a specific reality—a realm or kingdom, as it were. When we say 'law', when we speak of 'law', we should think not of any legal system, such as the law of one particular state, but of all the legal systems—present, past and, we might almost say, future,—of all social and, especially, political groups, likewise present, past and future. To put it more abstractly, law is the whole field of what is 'juridical'" (UNESCO Bulletin P. 29).

In addition, legal study in India is exclusively confined to legal topics, and non-legal subjects like political economics, sociology and psychology with which law is too closely linked up do not figure in the curriculum. The study of law divorced from these subjects does not help integration of law and its development. For a jurist, who is called upon to expound the idea of law and to explain its social value, it is desirable and necessary that such studies should form part of the curriculum. India already suffers from the dearth of jurists. So, it is absolutely essential that these subjects be taught along with the study of law. Study of these subjects are of great value not only for the jurists alone, but also for the eminent and learned lawyers and judges who should remain in touch with social evolutions. Such study enables them to transcend the bounds of technicalities or orthodox exposition of law. Their duties to the society are not only to apply the statutes and other state laws but also develop law in harmonious relation with the social progress. In addition, legal study should extend to the study of public and private laws of those foreign countries with which India is more closely connected in both economic and political fields. A knowledge of the laws of those foreign countries is useful for fuller comprehension of legal problems. In this connexion, it is interesting to note the conclusions reached at the symposium for the teaching of law held at Cambridge in July, 1952. It drew up a list of the subjects which the students of law should understand by the end of their courses. It thus listed the matters:

- "1. (a) The main branches of public and private laws including penal law and private international law.
- (b) The history of public and private law, or at least a broad outline of the development of those two branches of law.
- (c) Public International Law.
2. Social basis of law, to enable students to fit legal phenomena into their proper place among social phenomena (rudiments of general sociology and Politico-legal sociology).
3. Rudiments of foreign systems of law and use of the comparative method (comparative law) in the study of the national system of law.
4. Introduction to the philosophy and general theory of law, to develop the students' capacity for independent thought and critical faculty.
5. Economic basis of law, to help students to understand how legal institutions and rules are determined by economic doctrines, organisation and machinery

and provide the background to economic phenomena" (UNESCO Bulletin Appendix I. P. 124. Conclusions of The Cambridge Symposium on The Teaching of Law. Cambridge, 18-19 July, 1952).

As regards methods to be followed for teaching law, it is to be noted that different methods are followed in different countries. Broadly speaking, there are three methods widely carried on; viz. the 'Socratic method' or 'case-method', 'lecture system', and the 'tutorial system'. In the United States, Case method is prevalent in almost every school of law and not the 'lecture system' which is the usual method of teaching in almost every European country. 'Case method' helps a student to learn how to argue and to develop the reasoning faculty. It is thus useful and necessary for a student who intends to enter legal profession. But this system cannot be followed in India because of certain handicaps. First and foremost among them, is the scarcity of case books containing all the materials required to be dealt with following in 'Case method'. Of course, implementation of such method may prove handicap to the average students. In India teaching in law follows the British lecture system and to some extent tutorial system. But much stress is given on the former. Hence the teaching of law has become *ex-cathedra*, and the students are left to find out their own devices. They thus become unable to take any active part in the serious discussion. It is therefore desirable and necessary that this 'lecture system' should be supplemented by tutorials, seminars and other progressive methods.

M. Majumdar.

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SEPARATION OF JUDICIARY FROM EXECUTIVE IN INDIA

It is a common knowledge that sometimes the executive is vested with judicial functions. The danger of this tendency becomes much more prominent when the administrator of justice himself is possessed with preconceived and Pro-Governmental ideas. When the executive part of a sovereign government is involved in a litigation and gets a decree in its favour, situation becomes worse. The people in general sometimes consider this to be an abuse of process of law; it is not surprising that Lord Heward had to state, "How is it to be expected that a party against whom a decision has been given in a hole-and-corner fashion should believe that he has had justice" [The New Despotism—Hewart (1929) p. 48]. Of course, this is only true when the government emerges as a party to the litigation. And naturally, many of us have feeling that justice has become lop-sided, especially in such cases. This is prevalent not only among the majority of the litigants but also among leaders of our bar. We generally speak of liberty and equality when we discuss about administration of law and justice but these principles become irrelevant when one of the parties in litigation and the administrator of justice becomes the self-same institution. Besides this anomaly there is the other tendency of enlarging the scope of 'Administrative

justice'. Administrative justice in the words of Markose, has been described as, "all determinations of the administrative authorities affecting the private rights", [Judicial Control of Administrative Action in India—Markose (1956) p. 1] and, naturally this aspect cannot be ignored in evaluating the problem.

The complexity of legal problems in India has been often discussed, and rightly so. They arise out of two quite different legal systems—old traditional Hindu and Mohammedan jurisprudence and the foreign English legal science in the beginning of the nineteenth century in India. Yet in human terms, in spite of those divergences, at present the doctrine of separation of the executive and the judiciary seems the keynote.

The slogan 'leave the judiciary alone' is not historically ancient. Diffusion of ancient Indian courts with newly enlightened English system of justice could not, however, procure the cherished result of the system of administration in India. But, despite those set-backs the introduction of English legal system in India was on the whole effective in solving the major social problems. Much of the interest of contemporary legal problems was, however, laid down precisely by the effort to transcend those set-backs and to divert them into two primary branches of law—civil and criminal.

The present system of administering the criminal justice dates back to 1831. It was then held in some circles that, "the combination of so many divergent functions (collecting revenue, supervision of the police force, administration of criminal justice) in one officer might not result in the repression of crime which was then rife" [Separation of the Judiciary from the Executive—Naresh Chandra Roy, M.A., Ph.D.—Indian Law Review, Vol. II (1948) p. 210]. Much impetus was, however, put to these comments by Lord Auckland, Governor of Bengal, in 1836 when he appointed a Committee to enquire into the district administration and to make recommendations. The Committee in its report reviewed that the District Officers were overburdened with duties, so the recommendation came for their relief. The upshot of this report had become anomalous. The majority believed in separating the function of the revenue collector from that of the District Officer. But a more conducive and reasonable suggestion came from the minority. Frederick Halliday, afterwards the first Lieutenant Governor of Bengal, among others, opined that for an impartial and effective justice the District Officer should immediately be relieved of the judicial functions. The combination of the duties of the thief-catcher and the thief-trier in the same functionary was one of the main evils for the growing discontentment among the Indians. The following years had brought a great success for the majority. Their suggestion was implemented even without least distortion. But Sir John Peter Grant (1836-38) took up the argument of the minority in strong terms. "If a man is to be judge at all", he said, "he should be independent" [Separation of the Judiciary from the Executive—Naresh Chandra Roy, M.A., Ph.D.—Indian Law Review, Vol. II (1948) p. 210]. So the years passed with a tussle over this issue by the divergent British Officers. However, the separation was taken in view in 1861. But the reform, proclaimed in later

years, had indeed to await a greater and stubborn opposition—before being finally sealed off and postponed for ever. Emphasis had been put by the British Officials; their opinion was crystallised against separation; but nevertheless, the Indian counterparts, long quiescent, became from the middle seventies increasingly vocal and assertive in the issue of separation of Criminal justice from Executive control.

In 1879 Mr. Lal Mohan Ghosh, put forward a plea for the separation of the executive and the judiciary [Separation of the Executive and Judicial Functions—Dr. K. N. Katju—Indian Law Review, Vol. II (1948) p. 201]. He was in many respects a remarkable man, and hardly anyone in the history of fight for the separation of the Judiciary and the Executive in India had exercised such influence at such a crucial period. Later on, Mr. Romesh Chandra Dutta, that great scholar and administrator, in the Benares A.I.C.C. session moved a resolution on this topic in 1905 (Separation of the Executive and Judicial Functions—Dr. K. N. Katju—Indian Law Review, Vol. II (1948) p. 201). The efforts of these two great Indians had in the following years often been the main inspiring source for the movement of separation.

Such in the briefest outline is the history of one of the greatest legal issues, in India. It is after the independence, therefore, that principle of separation of the executive from the judiciary has been embodied as a directive principle of state policy in Art. 50 of our present Constitution which runs as follows: "Art 50. The State shall take steps to separate the judiciary from the executive in the public services of the State."

Most people have still to realize the vast extensions of available materials, the changes in method and outlook that have emerged for the separation of judiciary from the executive. The most fundamental change is the conception about modern state. "The Welfare State primarily endeavours to invest the administrator with almost unlimited discretion to fulfil social needs through the accomplishment of legislative policies by the method of trial and error" [Ibid (2) p. 4 and 5], is no longer and ideal description of a modern welfare state. Realisation has dawned in many quarters that rights of individuals have been taken away arbitrarily by conferring powers on the executive in the name of efficiency and quickness. And invariably, such uncontrolled power is apt to be abused. Naturally it is quite surprising that these administrative organs should cause alarm in some and satisfaction in other. There is, however, one consolation; strong and fearless critics at present are aware that owing to complexities and intricacies of modern system of Government vast legislations take place through, delegated legislation, which is "both legitimate and constitutionally desirable for certain purposes, within certain limits and under certain safeguards" [Dr. Katju and Separation of the Judiciary and the Executive—Prof. D. N. Banerjee—Indian Law Review, Vol. III (1949) p. 99-102].

Manifestly, our contemporary populations neither watch nor understand government. That they do so is a legal fiction. But we have to get along with that fiction for the present. Hon'ble Mr. Justice Meredith of the Patna High

Court took a more realistic view of things on the subject of the separation of judicial and executive functions in the country when he observed: "First of all, what is meant by the separation of these functions, and what does it involve? It meant the establishment of the principle that the judge who tries a case must be completely impartial, uninterested in the success of either side, and independent of outside influence" [Dr. Katju and Separation of the Judiciary and the Executive—Prof. D. N. Banerjee—Indian Law Review, Vol. III (1940) p. 99-102]. Continuing he stated, "This general principal involves two consequences, first, that a judge or magistrate who tries a case must not be in any manner connected with the prosecution, or interested in the prosecution. Second, that he must not be in direct administrative subordination to anyone connected with the prosecution (or indeed the defence)" (Dr. Katju and Separation of the Judiciary and the Executive—Prof. D. N. Banerjee—Indian Law Review, Vol. III (1940) pp. 99-102). Both these aspects of the matter are equally important and both reveal defects in our present system. And that they are also evils few will question.

But we cannot embark here upon even the most elementary description of the working of the governmental machinery or of any of its particular parts. Treatise beyond treatise would arise. It was Aristotle, the father of the Systematic Knowledge, who is said to have established this doctrine; but much more prominence was given by Locke and Montesquieu. The defenders against the doctrine of separation must have had noted with much anxiety when Montesquieu observed: "... there is no liberty, if the judiciary power be not separated from the legislative and the executive.... Were it joined to the executive power, the judge might be have with violence and oppression" [Spirit of Laws—Montesquieu, Vol. I (Prit Chand) p. 162-163]. The fact that, in a modern state the executive authorities find no hesitation to impose upon each individual their will in the name of justice, has always been the subject matter of controversy. The separation is advocated for the sake of the establishment of liberty; it is not only indispensable for public liberty but also a safeguard against abnormal or acute power mania.

We must remember that 'the body that deliberates and enacts laws is legislative, the body that judges and applies the law in particular cases is judicial, and the body that carries the laws into effect or superintends the enforcement of them is executive' [Wharton's Law Lexicon (14th Edn.) p. 388—In re A. K. Gopalan, 1953 C.L.J. 224].

Hitherto, as far as possible, our survey of the doctrine of separation of Executive and Judiciary has ignored practical feasibility, especially in India. But we have now reached a point where we must earnestly attempt to solve the problem. Though Indian Constitution has enunciated this doctrine as one of its directives for State policies, this doctrine, admittedly has 'no place in the system of Government that India has at present day under her own Constitution or which she had during the British rule' [Fazal Ali, J., in Delhi Laws Act (1912) Case. 1951 S.C.R. 747 (S.C.)]. In other words: "The Indian Constitution has not indeed

recognised the doctrine of separation of powers in its absolute rigidity but the function of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption by one organ or part of the State, of functions that essentially belong to another" [In *Ram Jawaya vs. State of Punjab* 1955—2 S.C.R. 225 (S.C.)]. It is true that the doctrine of separation of powers is imported from the West. But, unfortunately, it is opined by some that this Western concept is unsuitable for Oriental values. But recommendations have been made at the Law Minister's Conference, 1957 where it was resolved that the states should aim at separating the judiciary completely from the executive. Nine states have so far separated partially or wholly the judiciary from the executive; while in Andhra, Kerala and Madras, the separation is complete; Bihar, Bombay, M. P., Punjab, Mysore and U.P. on the other hand introduced it partially. West Bengal herself is on the way of implementing the doctrine for separation. The Law Commission, also in its 14th report has spoken highly of the doctrine. But we are constrained to say, what is regrettable, that we are simply detached from the above findings in practice. Statements of the judges should be appreciated and considered with due reverence. Even the highest executive authority of a democratic state cannot afford to cast an unwarranted or untoward reflection upon a judge. The apology solicited by a person no less than Pandit Nehru for his casual remark against The Hon'ble Mr. Justice Vivian Bose may be cited as an example of the aforesaid convention.

Still there is reason to believe that the Indian Constitution has deviated from strictly following the views of Sir Charles Elliot, a former Lieutenant Governor of undivided Bengal, when he published a rejoinder in the *Asiatic Quarterly Review* and emphasised, "I would point out that the keynote to our success in Indian administration has been the adoption of the oriental view that all power should be collected in the hands of a single official so that the people of the district should be able to look up to one man in whom the various branches of authority are centred and who is the visible representative of the Government" (Ibid 3); on the contrary it is acknowledged that 'when the devil admits the worth of right, good men have no more duty than its translation into action' (Harold Laski—*Authority in Modern State* p. 157).

But the apprehension, 'the executive can always see clouds on the horizon and every cloud is capable of bringing about a storm' (M. C. Chagla—*Law, Liberty and Life* p. 7), is simply unsuitable. It is now high time to consider, "any attempt at tampering with the status of the judges would be to corrupt the very fountain" (M. C. Chagla—*Law, Liberty and Life* p. 27), and further, "it should point out to the executive what is its rightful domain, and like the angel with flaming swords prevent it from overstepping it" (M. C. Chagla—*Law, Liberty and Life* p. 25). And if the encroaching tendencies of the executive over the judiciary is encouraged directly or indirectly by the Government it will tend to create a real despotism.

—Ajay Kumar Ray.

SHORT NOTES & VIEWS :**Proposed transfer of Berubari to Pakistan and its legal and constitutional aspects**

An agreement reached between our Prime Minister Sri Nehru and the erstwhile Prime Minister of Pakistan, Mr. Noon, which is popularly known as 'Nehru-Noon Agreement', in respect of cession Berubari Union in the District of Jalpaiguri, West Bengal, has attracted considerable attention of the lawyers. Some have held the agreement void *ab initio*; while others have expressed their views in favour of the proposed transfer.

Recently, it has been referred to the Supreme Court under Art. 143 for clarification of certain legal aspects of the matter which run as follows:—

Since certain doubts had arisen in connection with the implementation of the agreement between the Prime Ministers of India and Pakistan regarding the settlement of boundary disputes and the intended transfer of territories, the President by a reference dated April 1, 1959 referred the following questions to the Supreme Court for its opinion under Article 143 of the Constitution:

Is any legislative action necessary for the implementation of the agreement relating to Berubari Union?

Is a law of Parliament relating to Article 3 of the Constitution sufficient for the purpose, or is an amendment of the Constitution in accordance with Article 368 necessary in addition or in the alternative?

Is a law of Parliament relating to Article 3 of the Constitution sufficient for the implementation of the agreement relating to exchange of enclaves or is an amendment of the Constitution in accordance with Article 368 necessary for the purpose in addition or in the alternative?

As the legal and constitutional aspects of the issue have been referred to the Supreme Court and it is a sub judice matter, we have refrained now from making any comments. But we have published in this journal (p. 59 and p. 116) two contradictory views on this issue, which will be of much interest to the readers.

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The Second Law Teachers' Conference

Towards the end of December 1958, the Second Law Teachers' Conference was held at the University College of Law, Calcutta. The Conference was attended by delegates from various Universities and Law Colleges of India and the representatives of the Indian Legal Institute. Delegates from Australia and the United States also participated in the Conference. Professor Reeve of the Chicago University, Professor Rathenson of the North Western University of the U.S.A. and Professor Durham of the Melbourne University of Australia took part in the deliberations and were elected as Associate Members of the Indian Law Teachers' Association.

As an intellectual forum, the Law Teachers' Conference was of great intrinsic value and educational importance at a time when the legal study in India has drawn the critical attention of the Law Teachers, and was much talked about. It has also opened avenues for the law teachers to transcend the regional and geographical barriers and to meet together for rethinking and exchange of ideas.

At the inaugural address, Sri A. K. Sen, Law Minister, Government of India, pleaded for the creation of an atmosphere in the Law Colleges where legal research could flourish. He also observed that the legal institutions should not only turn out practising lawyers and judges, but also a large body of jurists and academic lawyers. Dr. P. N. Banerjee, Principal, University College of Law, Calcutta, and President of the Indian Law Teachers' Association, regretted in his presidential address the exclusion of legal education by the University Grants Commission from the field of their bounties. This is clear when he observed—"If the Law Colleges have to develop the spirit of research, if our law people are to be encouraged to be constructive, not only in the field of social science but also in the field of law, the University Grants Commission will have to review and revise its decision". Besides, some papers on topical subjects like 'Delegated Legislation', 'Symphony in Justice', the 'Role of Law Teachers' and 'Some Problems of Legal Education in India', 'Law System and its effect on the Social Structure of West Bengal' etc., were read and discussed.

In conclusion, the President suggested formation of a Committee which should prepare a memorandum on the courses of law examinations, emoluments and status of Law teachers.



The Indian Law Institute

The establishment of the Indian Law Institute with Sri Justice S. R. Das as its head and Shri K. M. Munshi as its Executive Chairman augurs a great future in the evolution of legal studies in India. Its objects are to cultivate the science of law and to promote advanced studies and research in Law and its administration, to advocate reforms in the administration of law and justice, to bring about a healthy development suitable to the social, economic and other needs of the people, to promote the improvement of legal education, to publish studies, treatises, books, periodicals, reports and other literature relating to law and allied fields.

It has carried on research on subjects like administrative procedure, judicial review, delegated legislation, inter-state movement of commodities and persons, fundamental rights in the Indian Constitution, their scope, operation and trend. Of these, delegated legislation is being conducted under the guidance of Mr. Justice P. B. Mukherjee of Calcutta High Court.

India is a sovereign democratic Republic. It has framed its own constitution aimed at establishing the socialistic pattern of society. Under the fast changing circumstances affecting the life of the people, the importance and usefulness of the existence of a machinery like this which devotes itself "to cultivation of law

in a scientific spirit, to its study, to the comparative study of the various branches and aspects of law and also with a view to suggesting reforms" in the administration of law and justice can hardly be exaggerated.



OBITUARY

Sachindranath Bhattacharyya

It is with the deepest sorrow that we mourn the sad demise of Professor Sachindra Nath Bhattacharyya who was the President of our College Union in the years 1943-1946. He was extremely popular with the students. Professor Bhattacharyya was a constant friend and guide to the students. His untiring efforts and labour for the betterment of the students and his sweet and polished behaviour will be remembered for all time to come. He was also a well-known figure in the Calcutta High Court with his dignified bearing and polished manners. He was connected with many educational institutions and took an active part in the activities of the Calcutta University Institute. He was also connected with the Boy-scout movement. We extend our heart-felt sympathy to the bereaved members of his family. May his undying soul rest in peace.

Nattyacharyya Sisir Kumar Bhaduri

"Death cancels everything but truth, and strips a man of everything but genius and virtue." The void created by his passing away will continue to be keenly felt by all who knew him. Not only to be keenly felt by all who knew him but also will still be fresh in the memory of almost inconceivably distant generations of us. Bengal has surely lost an actor with rare histrionic gift in the sad demise of one of her most illustrious and illuminating sons.

The king of the Bengali stage drew his last breath on June 30 at 1-30 a.m. The ghosts of 'Alamgir' or 'Shahjahan' haunt the living world of to-day by grace of magic acting of Sisir Kumar; and, when he is no longer heard it is safe to prophesy that the man Sisir Kumar will outlive the actor, the greatness of the man will overtop and outlast the honours of the actor.

At times when we pay our tribute to this greatman we have still fresh in mind that, "the times also were eager for the reception of a man like him, Amarendra Nath Dutta who commanded great popularity amongst the student community was no more, the old actors were getting stereotyped. Even Dani Babu was getting older and required rejuvenation. At such a time the appearance of Sisir Kumar on the Bengali stage was considered as a blessing, for it and when he appeared, public support and sympathy were showered upon him in full measures." In short talents have far surpassed parochial limits.

Born in 1889 he took his M.A. in English and was a student of our college in the period 1911-13. He constituted a link between the glorious epoch of the

Bengal Renaissance on the one hand and today's frantic and confusing search for new values on the other. For him the Bengali stage was not a decoration but a necessity. Time itself will recollect: 'A straight unbending figure, Sisir Kumar walked through the stage of life amidst conflict and vicissitudes to a fixed, unalterable goal.'

He had done the undone work of Girish Chandra Ghose, but who will do the undone work of Sisir Kumar? He wanted "National Theatre Hall." So we hope the foundation of a National Theatre Hall will show respect to his soul.

Let him rest in peace.

ACKNOWLEDGEMENT

Finally, we avail ourselves of the opportunity of recording our gratitude to our most revered Principal Dr. P. N. Banerjee, without whose vigilant insistence and valuable advice and guidance our journal would not have been so successful as it has been. We are grateful to our vice-principal, Dr. B. N. Mukherjee, our President, Professor S. A. Masud, Vice-Presidents Professor S. N. Mukherjee, Professor S. K. Mitra and also to Sri S. Kanjilal, Superintendent of the University Press, for their enthusiasm and co-operation. Hereby we forbear from trying to express our deep gratitude to our EDITOR-IN-CHIEF, Dr. P. C. Chunder whose active participation and guidance in the preparation of this journal has enriched the journal.

We have the pleasure to express our hearty thanks to Sri Mrityunjoy Basu, Superintendent, Sri Kalikumar Dutta, Librarian, Sri Bijan Behari Chakravarty, Sri Sribhusan Mitra, Sri Anath Bondhu Samadar, Sri Chandrasekhar De, Sri Arun Datta and others on the office staff for their active and hearty co-operation. We offer our thanks to Messrs. Navana Printing Works Private Limited, Calcutta, for their earnestness in matters of publication.

Hereby we offer our heartfelt thanks to Sri Barun Deb of III Year, Sri Gitesh Bhattacharjya (ex-student), Sri Barun Dev Mukherjee II Year and the members of the editorial board for their co-operation and assistance.

We express our thanks and gratitude to those who have enriched this 'Journal' by their kind contributions and to the students in general for their collaboration and sympathy.

STUDY OF LAW

By

The Hon'ble MR. JUSTICE S. R. DAS,

Chief Justice of India.

I find genuine pleasure in having this opportunity of addressing the young students of the Law Faculty of the University of Allahabad and I thank you, Dean and the other authorities of the University, for having accorded to me this privilege.

Forty years ago I started my legal career. I was enrolled as an advocate of the Calcutta High Court and secured, through the good offices of Sir Ashutosh Mukherjee of revered memory, a part time lectureship in the University College of Law at Calcutta. I held my lectureship only for about three years but had to resign it with a view to devoting my undivided attention and the whole of my time to my professional work in the High Court. But those three years of my life had done me a world of good, for in order to be in a position to expound and explain the principles of the subject which had been entrusted to me, I had to study the subject somewhat more closely than I did as a student to pass my examination in that subject. I venture to think that in the process I learnt something about it. But what is equally important is that the daily contact with the young students definitely added a freshness to my outlook on life and vigorously stimulated my mind. I was myself quite young then and it was, therefore, easy for me to find myself in perfect tune with the aims and aspirations of my youthful students who were at the threshold of the career they had chosen. Those three years of lectureship in law have left

an indelible impress on my life and outlook. When your Dean asked me to come and meet you and speak to you, his request immediately brought back to my mind that vivid picture of a young teacher lecturing before the students of a law class. In that frame of mind there could be no question of my declining his invitation. Further, having been the recipient of a law degree of this University, I have in a way come within our Dean's *patria potestas* and consequently I had to respond to his call with alacrity. And so here I am and I repeat that I am very happy to be here with you today.

Our law colleges, they say, are overcrowded. It is to some extent correct. Admission into the post-graduate classes in most of the faculties of science, engineering, technology or medicine is somewhat difficult to secure, for the number of students to be admitted therein is limited. So some graduates come to the law colleges because they can find no other opening. They are, however, not serious about their study of law. The law faculty is, for them, a temporary rest house and they drop out as soon as they find some suitable job. But the majority of students enter the law faculty with the serious intention of qualifying themselves as full-fledged lawyers entitled to practise in the law courts. Some of them even have the intention of becoming law teachers and to be engaged in researches into the different branches of the law. It

is to these students of law who have chosen the law as a career that I desire to address a few words. But I assure you that I shall not detain you long.

The study of law has at all times and in every country been recognised as a liberal education. It sharpens our intellect and other faculties and generally broadens our outlook. A law student never takes anything for granted. He is trained to probe into the reasons underlying the principles of law. He is taught to respect the doctrines of law laid down and enunciated in judicial decisions; but his training also emboldens him to question the correctness of a decision if it does not accord with his notion of what the law is or should be. The study of law develops the student's power of reasoning and enlarges his capacity to go down to the roots of all problems that come before him. This is, therefore, the time for you to replenish the storehouse of your knowledge. Whatever you will now gather will come useful to you. Make the best use of the opportunity for study that the law faculty offers you and you will realise that these few years have not been spent in vain.

Apart from the study of the general legal subjects, e.g., the law of crimes, contract, torts, equity, evidence, procedure and so forth, you should take special interest in the study of public international law. In the context of the tremendous advance in modern science and technology, distances have shrunk and each country has become a neighbour of other countries. The relationship between different countries has become closer and more intimate. It is essential, therefore, that lawyers should have a correct idea of the law that regulates the mutual rights and obligations of different countries on the international plane. A working knowledge of the international law

is, therefore, a part of the necessary equipment of every practical lawyer of today. You should, therefore, devote some part of your time and attention to the study of that branch of the law.

In modern days practice in courts of law is fast becoming specialised. When you will enter the profession, you will find that legal practitioners are confining their activities in specialised fields. Some are habitually confining their practice, say, to tax cases—income tax and sales tax. Some are specialists in labour cases and appearing mostly before labour tribunals. The exigencies of modern civilisation more and more require the setting up of administrative tribunals for the adjudication of claims and disputes by and through those special tribunals. You should, therefore, turn your attention to these subjects so that it will become easy for you, should you be so inclined, to pass on to these specialised fields. Some knowledge of these subjects and some insight into the working of the administrative tribunals which administer those laws which also regulate the proceedings before those tribunals will be very useful to you. The legal education of a modern law student cannot be said to be complete without some knowledge of administrative law. I have no doubt that the university authorities are alive to this aspect of the matter and will afford adequate facilities to you to get proper training in these subjects.

I have often heard it said that, in order to succeed in the legal profession, one has to have an intellectual brilliance of a high order. Intellectual brilliance is certainly useful and everyone will surely like to have it, but I assure you, from my personal experience, that it is not an indispensable requisite for success. There are on record many instances of brilliant men going down

to men of ordinary intelligence in the struggle for existence in the profession. My experience tells me that, for attaining success at the Bar, a practising lawyer must have or cultivate and develop four basic qualities which I now proceed to enumerate.

First and foremost you must have a robust health. The profession of law is a jealous mistress and demands your undivided attention. It requires a strong constitution to stand the strain of the arduous day to day work of a practising lawyer. In the first few years you may not have any work of your own and yet you will find that your working hours are crowded. You will have to start your day rather early. If you are not a rich man's son or, I may add, son-in-law, you may have to foot a mile or two to reach the house of your master for whom you may happen to be devilling. You will take up some of his briefs and prepare notes for him. Do not be disheartened if in the beginning he does not even look at the notes you prepare for him but simply drops them in the waste paper basket. But be sure that one day while preparing his case he may be troubled with a point of law and may out of sheer curiosity pick up your notes from the waste paper basket and be happy to find the exact ruling he was looking for. From that day you may be fairly sure of sympathetic consideration and solid backing. Such things do happen and you have to wait for it patiently and go on working harder and harder. You will go to court and get the cases he cannot attend to adjourned for a week or so. You will come back to the court where your master is functioning and sit behind him in court and see how he handles the cases. If you have already read the brief, you will know the facts and you will readily follow the proceedings and appreciate how he is scoring his points. After the day's strenuous work you will have a hurried tea and then you

will go again to the master's house and spend the evening hunting up rulings on points he may desire you to find for him and come home, sometimes quite late, completely fagged out. This routine will begin again in the morning of the next day and the day after and so on. This daily drudgery, take it from me as one who has gone through it, requires a very strong constitution to bear it. The strain will not become any the less when you will begin to have work on your own. First and foremost, therefore, pay attention to your health and develop an iron constitution. Success at the Bar cannot ordinarily be attained by a person who has not got a robust health. Accordingly I assign 25 marks out of a 100 to the possession of good health as a pre-requisite for success at the Bar.

The next requisite for success is an indomitable will to succeed. You must cultivate a sense of sober confidence in your own capacity. Over-confidence may be foolhardy and is rightly deprecated but an advocate who has no confidence in himself cannot hope to convince anybody. Diffidence will never see you through. Do not be deterred, dismayed or disheartened by occasional failures. Console yourself with the thought that seventy-five per cent. of the cases fought in courts win or lose themselves, irrespective of the merit or otherwise of the advocates participating in the battle. There is always the Judge whose responsibility is to decide every case justly and correctly. But you too must be prepared to do your bit. Shake off diffidence and cultivate a dogged determination to succeed. I assign 20 marks to this quality.

The third requisite is an innate sense of fairness and transparent honesty. You must be fair not only to your own client but to your opponents and their clients. Above all, you must be straightforward in all that you say and do in court. If there is any

defect in your case, face it, for the advocate on the other side is sure to point it out to the court, or at any rate, the court may find it out for itself. Therefore be candid with the court. I think this item deserves 20 marks out of 100.

The fourth requisite for success is what all of you are presumed to have, namely, an ordinary intelligence, for without it you would not have passed your degree examination and would not have reached the law faculty at all. Try to reinforce it by developing a strong common sense, which, they say, is fast becoming uncommon. Observe men and things that are happening all around you and deduce your conclusions. The sum total of these conclusions will constitute your bundle of common sense. Whenever a new problem arises, test it in the light of your common sense. I keep 15 marks for this.

The remaining 20 marks out of 100 are assigned to an attribute which nobody can acquire by study but which some may be lucky to be born with. To be a successful advocate one has to have plenty of good luck. God forbid, a few of you may be particularly unlucky, but it is expected that most of you will have a fair share of luck. In any event 80 per cent. of the marks have been allotted for other qualities which you may cultivate and acquire and you can be sure of a good innings if you concentrate on those virtues.

It is no doubt true that you have chosen law as a career for the purpose of eking out your means of livelihood. What I want to impress upon you is that making a living is not the be-all and end-all of lawyers' life and ambition. I may tell you a story that was told by Chief Justice Earl Warren of the Supreme Court of America while addressing the law students of the Delhi University. It is no doubt a hackneyed story,

but I think it may bear repetition. An old gentleman was passing along a road and found a building under construction. He found three workmen at work. One was digging a trench, another was sawing some timber and the third one was laying bricks. He came up to the building site and spoke to the first workman who was digging trenches. Said he: "Well, my man, what are you doing?" That man replied that he was a common labourer and had been employed to dig trenches and that the remuneration he was getting was hardly sufficient to maintain himself and his family. The old man next approached the second man, who was sawing some timber and asked him the same question. That man replied that he was a carpenter by occupation and was earning his living by exercising his skill as a carpenter. The old man then turned to the brick-layer and asked: "What be you doing, my man?" That man stopped his work, looked up at the old man, rose and inhaled a deep breath and throwing forward his expanded chest said that he was building the temple that was under construction. That mason was a workman just as the other two were and he was also earning his living but he was at the same time conscious that he was doing something more. The old man shook hands with the mason and passed on. I want to impress upon you the moral of this story. While you will be exercising your legal profession for earning your means of livelihood, you should at the same time be conscious that you will be doing something far nobler and grander than the mere earning of your livelihood. You should feel and be justly proud that by exercising your profession you will, besides earning money to maintain yourself and your family, be also assisting in the construction of a noble and great edifice—the sacred temple of justice. It is this nobler outlook that you should never lose sight of.

Ours is a profession which has been rightly called a learned profession and an honourable one. In the profession that you are seeking to enter you will find keen competition. You will prepare yourself to fight bitter battles at the Bar, but those fights will be without rancour or malice. You will find limitless generosity in your seniors. They will rejoice with you on your successes and they will give you sincere sympathies in your defeats. You will bear in mind the high traditions of the profession and you

will emulate the examples of the great legal luminaries who have gone before you and learn your lessons from their examples. It may well be that there may be long years of waiting until success comes within your reach. But have patience, have faith in your own ability and have perseverance. I bring to you good cheer and a message of hope. Be determined to succeed and you will go a long way. I wish you a successful career at the Bar and I pray that God be with you.

Jai Hind!

*"Doing is very good, but that comes from thinking
Fill the brain, therefore, with high thoughts, highest ideals, place
them day and night before you, and out of that will come great
work."*

A Practical Study on delegated Legislation

By

The Hon'ble Mr. JUSTICE P. B. MUKHARJI

Practical research work on delegated legislation with reference to actual instances and forms of delegation resorted to by Indian Statutes has hardly been undertaken in India. No intensive and practical study appears to have been made. Cases do come up at random before the Courts but then no systematic efforts have been made to collect even the few and infrequent judicial decisions on the point and to present them in any methodical form. The object of this article is to indicate a beginning of what may be, a very practical, useful and promising research project.

I shall examine one particular Statute as an illustration to exemplify how delegation works in India. As India is taking big strides in industrial progress I have selected a Statute from the vast mass of industrial welfare legislation. The Statute which I propose to examine is the Factories Act, 1948. It typifies many forms of delegated legislation in use in modern legislative methods.

First, there is the general power to make rules under Sec. 112 of the Factories Act. It is phrased in general language stating that the State Govt. may make rules providing for any "matter" which under any of the provisions of the Act, is to be or may be prescribed or which may be considered "expedient" in order to give effect to the "purpose" of the Act. Although this delegation of powers to make rules is wide, its limitation appears to be (1) first, with regard to subject which must be a "matter"

under or for the purposes of the Act. And (2) secondly, with regard to object which must be to give effect to the "purpose" of the Act. This delegation, however, does not specify who under the State Govt. will make the rules. This is impersonal delegation to the executive Govt.

Secondly, there is another type of delegation in this Act which delegates power to the Central Govt. to give "direction" to the State Govt. with regard to carrying into execution of the provisions of the Act under Sec. 113 of the Statute. Powers to the Executive Govt. to give directions are becoming a very common type of delegation in India. The nature and character of this delegation to give "direction" have not yet been sufficiently investigated and examined by the Courts. In a recent decision of the Supreme Court reported in the Newspapers on the petition of Raman and Raman Limited under the Motor Vehicles Act, containing similar provision for giving direction, the Supreme Court is reported to have said that these "directions" are in their nature executive and do not acquire the character of law. Many problems arise on this form of delegation. These directions may be executive but the question remains how far they bind the State Govt. as part of the law under the Statute. For instances, under Sections 112 and 113 of the Factories Act, 1948, can these "directions" issued by the Central Govt. be regarded as "expedient" under Sec. 112 and embodied in the rules framed accordingly by the State Govt.

When so done, it is submitted they acquire the character and status of law.

Thirdly, Sec. 115 of the Factories Act, provides for the publication of rules by saying in effect that all rules made under this Act shall be published in the Official Gazette and will not take effect before three months from the date on which the draft of the proposed rules is published. This period of three months may be presumed to be a period of checking the reactions and objections, if any, to the proposed rules before they come into effect. The idea may also be that this period of three months is given only as a period of grace to factories to adjust themselves to the operation of the new rules and not with a view to altering the rules or revising them after checking any reactions or objections to such rules during this period. The Statute does not make this clear, although reference to Sec. 23 of the General Clauses Act. in Sec. 115 of the Factories Act appears to imply the right of objection and consideration of such objection.

The fourth type of delegation which occurs under the Factories Act is grant of power to exempt, for instance, under Sec. 50 of the Factories Act, 1948. Under this form of delegation the State Govt. may make rules exempting a factory or class or description of factory from complying with the Statutory provisions relating to welfare facilities under Chapter 5 of the Act. The only limitation of this power to exempt is that it is subject to compliance with such alternative arrangement for the welfare of the workers as may be prescribed. Again, in Section 64 of the Act, the State Govt. is given the power to exempt persons from the operation of this Section of the Act relating to the working hours of adults under Chapter 6 of the Statute. Under this Section, the State Govt. may make rules defining such persons. The limitations of this

power provide that the exempted persons must be those who hold position of supervision or management or are employed in confidential position in a factory. Again, in Sec. 64(2) of the Act, powers are given to the State Govt. to make rules in respect of adult workers in a factory providing for the exemption to such extent and to such condition as may be prescribed. The nature of, or the limitation imposed on, these powers is with respect to the quality of work, e.g., workers on urgent repairs or workers engaged in work in another preparatory or complimentary work or works which are technical or intermittent or workers engaged in making or supplying articles of prime necessity. The exemption offered under Section. 64(2) of the Act is, however, only with respect to specific Sections 51, 52, 53, 54, 55 and 56 of the Statute and are also conditioned by the upper limit as provided in Sub-section 4 relating to hours of work. A wider power of exemption is conferred under Section 65 of the Act by which the State Govt. may by written order relax or modify the entire Section 65 of the Act relating to periods and notices of the works for the adult. This power to relax or to modify the Statute is limited by the nature of work or "other circumstances". But the extent of the power to relax or modify is, in a sense, unlimited, because it provides that such relaxation or modification may be made "to such extent and in such manner as it may think fit and subject to such condition as it may deem expedient to ensure control of periods of work". The "extent", the "manner", the "condition" and "other circumstances" are all unspecified and vague.

There is a fifth type of delegation under the Factories Act, 1948, which can be illustrated by Sections 85 and 86 of the Statute. It concerns the power to apply the whole Statute to certain premises and the power to exempt public institutions. Under this

power the State Govt., by notification in the Official Gazette, may declare that all or any of the provisions of the Act shall apply to any place where a manufacturing process is carried on with or without the aid of power in spite of the fact that such places do not come within the definition of Factory as provided in Section 2(n) of the Act. It says that after the place is so declared it shall be deemed a factory for the purpose of the Act and owner shall be deemed to be the occupier and any person working therein a worker. Indeed, this is a delegation of great power. In fact, it means the delegation of the power in respect of a particular place. The only guide or standard laid down by the Statute for exercise of this extensive power of delegation is that the place must be one where a manufacturing process is carried on or is ordinarily carried on with or without the aid of power. But no other conditions or guides or standards are laid down. A place working with two workers with a small motor might be faced with the entire obligation and responsibility imposed by the Act; whereas, a place larger than that may be exempted. This type of delegation is of the same kind that was upheld in the leading case of *Queen V. Burah** in a different context. The power to exempt public institution under Sec. 86 of the Act is only limited where the purpose is for education, training or reformation. In such case, the workshop where the manufacturing process is carried on and which is attached to a public institution maintained for these purposes, may be exempted from the whole or any part of the Statute. The words may be regarded as too general and specially the word "trained".

This particular study of the Factories Act, 1948, reveals and illustrates at least five different types of delegation under the Statute.

The delegate always appears to be the

State Govt. Delegation does not specify the person or persons on behalf of the State Govt. who will act nor does it specify the procedure which he is to follow, in so acting. Delegation by the use of the words "the State Govt. by notification in the Official Gazette" may mean anyone including any subordinate officers. These subordinate officers mean undisclosed responsibility. What, if any, sufficient check is imposed on such subordinate officers is not known. No doubt, the State Govt. as such is a responsible institution. But who discharges these duties on behalf of the responsible Govt., is a crucial question. Very often in the routine administration of the Govt. some subordinate officers and even clerks put up the notes which by sheer administrative routine pass as rules although they may have, as a mere matter of form, passed through the whole hierarchy of the administration. This is what I call impersonal delegation and is largely responsible for strange rules not always consistent with the Act or its spirit and sometimes impracticable causing avoidable hardship.

Secondly, directive delegation by which the Central Govt. is given Statutory Powers to issue direction to the State Govt. appears to be both illogical or irrelevant in a Statute. It is open to many criticisms. In the first place, in the Constitutional structure of India with its division of legislative lists between the State and the Centre, it does not seem to be necessary, where the Statute deals with Parliamentary subjects, that the Central Govt. should take legislative sanction for issuing executive direction to the State Govt. Either the power is there or it is not. In a centrally administered subject, ordinary administrative and executive direction from the Centre to the State for proper administration must always be implied as a pattern of Executive Government for the proper working of the Act through-

*[1878] 3 A.C. 889.

out the country. If the subject is not within the competence of Parliament, then of course, no question arises, because the Statute itself or the particular Statutory provision will be bad on the ground of being ultra vires the Constitution. As the executive directions may so alter the nature and basis of the administration, that without any provision for their publicity to inform the affected people about such directions they become worst types of delegation. People do not know what are the executive directions? Nor do they know who frames these executive directions? Nor do they know how these executive directions come to be made? It is suggested that this type of delegation be altogether abolished from the Statute. It is sometime said in favour of this type of executive direction that they tend to bring uniformity of administration in the different States in India. Assuming it does, then the delegation suggested for this purpose is that in Parliamentary Acts with Central subjects, the power of delegation should be reserved only to the Central Govt. and not to the State Govt. with the provision, if necessary, that the State may have limited powers to deviate from such directions only in case of specified variations in local conditions. Similarly, in the State Act with State subjects, this power of delegation should be reserved only to the State Govt. with similar provisions to the Central Govt. to exercise limited powers of delegation on points not covered by the State delegation.

Thirdly, the power of delegation to apply or suspend or exempt persons or subjects or area from the operation of a Statute should be discontinued. Its sole justification is that for some special reasons it is necessary sometimes as a practical measure. This justification does not stand close scrutiny. This is an extensive power and in fact, it is not only legislation without a legislature, but is worse. It means that if the basic assump-

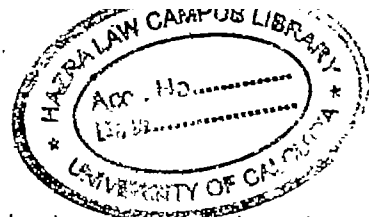
tion of making exception is admitted originally, then the subsequent application of the Act may also have to be qualified or modified. But who is to judge this modification. The legislator gets no chance. The delegate uses his discretion or his own procedure and his own judgment of the situation unaided by any standards except ad hoc ones that he may hit upon. It is indefensible in a Constitutional democracy. I suggest that instead of delegating the whole power of legislation to a delegate, Parliament and the State Legislatures should pass in every such case a short amending Act extending the Statute to a particular area or person or subject or exempting the same as the case may be. This will respect local condition. At the same time, it will give the legislator concerned a chance to see whether the Act should be applied or suspended or modified and if so, on what condition.

Fourthly, it is difficult to appreciate the practical value of the type of delegation which attempts to pacify Parliamentary and Legislative conscience by providing for the procedure of laying the rules on the Table. To my knowledge and information, no such rules laid on the Table were ever taken up either in Parliament or State Legislature for discussion, criticism, correction or modification. Very often the rules are ponderous; the legislators have no time to look into them; the technicalities involved in the rules are forbidding to most. The result is nobody cares whether the rules are in fact on the Table or not. In the legislative history of the British House of Commons, it so happened that such a procedure for laying the rules on the Table was not observed for more than two years and thus, committing a breach of the Statutory direction to lay on the Table within a specified time. The members of Parliament never even noticed that fact with the result that an Indemnity

Act had to be passed three years after. Dr. Allan quotes the incident in his book "Law and Orders" on the National Fire Service Regulation under the Fire Service Emergency Provisions Act, 1941. This situation is also not unknown in Parliament in India where the Parliamentary Committee of delegated legislation has reported that there has been unusual delay of even two years in laying the rules on the Table. The Parliamentary and the State Statutes are not at all clear in India as to what happens if the rules are not laid on the Table. If the rules become law before they are laid on the Table and some Statutes seem to imply that conclusion, then laying the rules on the Table becomes a useless procedure. No Parliamentary or State procedure prescribe how the rules which had become a part of the Act can thereafter be amended of the Act. Failure to lay on the Table does not make the rules void ab initio. This is regarded as best as breach of a direc-

tory and not a mandatory provision. If the reason for the provision for laying the rules on the Table be to put the fear of Parliament or Legislature in the mind of the actual rule-maker then the fear is found to work more harm than good. Bad rules can always be criticised in Parliament whether such provision is there in a Statute or not. When they become part of the Act then a bad Act can always be amended in a sensible and democratic Parliament whether such provision is there in a Statute or not. What is not often appreciated is that the presence of this provision for laying the rules on the Table tend to undermine the responsibility of the rule-maker on the ground that if there be anything wrong it will be corrected by Parliament. But as Parliament has no time it cannot take effective responsibility. The result is divided responsibility and consequent perfunctoriness in rule-making.

"The law is the last result of human wisdom acting upon human experience for the benefit of the public."



Inter-State Trade & Commerce and the Constitution

By

The Hon'ble MR. JUSTICE D. N. SINHA

LP2103.

There can be little doubt that our country is passing through a stage which is comparable to the stage through which Europe, and the western world generally, passed through many decades ago, popularly known as the "Industrial Revolution". From a country wholly dependent upon agriculture for its livelihood, and as producer only of raw materials, we are suddenly being transported to an age where the emphasis must shift from agriculture to industry, if we are to survive and take our rightful place with the progressive nations on this earth. For this purpose, our Government has been introducing phased plans. The First "Five Year Plan" put an emphasis upon agricultural production. In the Second "Five Year Plan" however, the emphasis is on industry. There can be little doubt that this will continue in the Third and subsequent Plans, because it is admitted, and bears no denial, that India must emerge as a predominantly industrial country, if our greatest drawbacks, namely, poverty and a low standard of living, are to be effectively conquered. It is in this background that the constitutional provisions relating to trade, commerce and intercourse within the territory of India have become important, and must engage our deep attention. In this article I shall endeavour to say something about the relative provisions in our Constitution regarding such matters. The subject of trade, commerce and intercourse within the territory of India are dealt with in Part XIII of the Constitution. As will appear shortly, the provisions in this Part of the Cons-

titution are not to be read in isolation. The other parts of the Constitution, particularly part III dealing with the fundamental rights, have an important bearing upon the subject. For example, article 19(1)(d) which grants the fundamental right to the citizen to move freely throughout the territory of India, or 19(1)(e) to reside and settle in any part of the territory of India, or 19(1)(f) to acquire, hold or dispose of property, or 19(1)(g) to practise any profession or to carry on any occupation, commerce, trade or business must necessarily have a bearing upon the constitutional provisions relating to trade, commerce and intercourse dealt with in Part XIII of the Constitution. To this aspect I shall presently refer. Coming now to Part XIII, we find that it consists of 7 articles, namely, article 301 to 307. Article 301 relates to freedom of trade, commerce and intercourse. This article is easily the most important in this series. It will be found that it enunciates the general or overall right of free trade which are then qualified and/or restricted by the others. Article 301 lays down that subject to the other provisions of Part XIII of the Constitution, trade, commerce and intercourse throughout the territory of India shall be free. Obviously this is a right given in very general terms. It corresponds to section 297 of the Government of India Act, 1935 which provided for the freedom of the internal trade in India. The Government of India Act, 1935 did not contain any general declaration or guarantee of the freedom of inter-provincial or in-

tra-provincial trade as enacted in this article. Section 297 imposed certain specific prohibitions against restriction on the internal trade of the country. These prohibitions were imposed on the provinces and not on the centre. Section 297 was in two parts. The first part related to the restrictions on inter-provincial export or import. It restricted the powers of the Provincial Legislature and Government to pass any law or take any executive action prohibiting or restricting the entry into, or export from, the province of all goods of any class or description. The second part prohibited the imposition of discriminatory taxes by one province as against goods produced or manufactured in other provinces. It has been said that article 301 is based on section 92 of the Australian Constitution. Section 92 of the Commonwealth of the Australia Constitution Act lays down that trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be 'absolutely free'. It will be observed that the phraseology of article 301 has a close resemblance to section 92 of the Australian Constitution. There are however, several differences. To start with, note the use of the word "absolutely" before the word "free" in section 92. In fact, the Australian Constitution merely contains a simple enunciation of the doctrine of inter-state free trade without laying down the permissible limits. This has given rise to a great deal of controversy. Speaking about section 92, Lord Porter delivering judgment of the Privy Council in *Commonwealth of Australia v. Bank of New South Wales & ors.* (1950) A.C. 235 observed—"In this labyrinth, there is no golden thread". Indeed, it has been said that section 92 had caused more differences of judicial opinion and greater conflict between decisions than any other provision of the Australian Constitution. As I have

stated above, in the Australian Constitution there is no explanation of the wide provisions contained in section 92. Lord Porter in the case mentioned above said as follows:—

"In this labyrinth there is no golden thread. But it seems that two general propositions may be accepted—(i) that regulation of trade, commerce and intercourse among the states is compatible with its absolute freedom, and (ii) that section 92 is violated only when a legislative or executive act operates to restrict such trade, commerce and intercourse directly and immediately as distinct from creating some indirect or consequential impediment, which may fairly be recorded as remote".

Referring to the use of the words "absolutely free" in section 92 of the Australian Constitution, Rich J. of the High Court, Australia, said the following in *James v. Cowan* (1930) 43 C.L.R. 422:—

"The rhetorical affirmation of sec. 92 that trade, commerce and intercourse between the States shall be absolutely free has a terseness and elevation of style which doubtless befits the expression of a sentiment so inspiring. But inspiring sentiments are often vague and grandiloquence is sometimes obscure. If this declaration of liberty had not stopped short at the high-sounding words "absolutely free," the pith and force of its diction might have been sadly diminished. But even if it was impossible to define precisely what it was from which inter-State trade was to be free, either because a commonplace definition forms such a pedestrian conclusion or because it needs an exactness of conception seldom achieved where constitutions are projected, yet obmutescence was both unnecessary and unsafe. Some hint at least might have been dropped, some distant allusion made, from which the nature of the immunity intended could afterwards have been deduced by those whose lot it is to explain the elliptical and expound the unexpressed."

The framers of the Indian Constitution have attempted to avoid the difficulties that have been felt in Australia by making or attempting to make provisions restricting general powers, or at least qualifying them. Let us, therefore, see what the nature is of such restriction and/or qualifications and whether we have succeeded in avoiding the pitfalls of our Australian counterpart. Article 302 gives to Parliament the power by law to impose such restrictions on the freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required, in the public interest. Article 303 however, lays down that no law shall be made giving any preference to one State over another, or discriminating between them, by virtue of any entry in the 7th schedule, unless it is declared that it was necessary to do so for the purpose of dealing with the situation arising from the scarcity of goods in any particular part of the country. Article 304 relates to taxation, and other restrictions on trade, commerce etc. It gives power to the legislature of a State to make a law imposing, on goods imported from other States, any tax to which similar goods manufactured or produced in that State are subject, so that between the said goods there should be no discrimination. It may also impose such reasonable restrictions on the freedom of trade, commerce or intercourse with or within the State as may be required for the public interest, provided that in such a case, the previous sanction of the President was obtained. Article 305 saves the application of certain existing laws providing for State monopoly. I shall presently mention why it was necessary to introduce this article, there being a history behind it. The last article in this part gives power to Parliament to appoint such authority as it considers appropriate for carrying out the pur-

pose of articles 301, 302, 303 and 306 and confers on the authorities so appointed, such powers and such duties as it thinks necessary. The question is whether by introducing these various qualifications of the general right of free trade conferred by article 301, the law has become sufficiently specific to avoid any controversy. Sir Ivor Jennings has commented as follows in his lectures on the Indian Constitution:—

“New generation of the Australian lawyers would like to get rid of section 92 of their Constitution, which seems to them to be more trouble than it is worth. It seems certain that in 20 years the Indian lawyers will be able to point out that the Australian lawyers do not know what trouble is”.

I have already pointed out that Australian Constitution provides for freedom of trade & commerce in section 92 and makes the right “absolute”, but has not provided the qualifications. The American Constitution does not contain any express provision guaranteeing freedom of inter-State trade and commerce. But, Article 1 section 8 of the American Constitution, contains a clause known as the ‘commerce clause’, which confers on the Congress the power “to regulate commerce with foreign nations and among the several States and with the Indian tribes”. The law on the subject had to be built up in America by judicial interpretation. For example, the clause does not state that powers conferred upon Congress were exclusive, but it has been held by judicial interpretation that such power must necessarily be exercised by the Federal Government exclusively and not by the States. Since the power is granted in a few sentences, the question must constantly arise as to their scope and meaning. For example, in the leading case of *Gibbons v. Ogden* 6 L.Ed. 23 the question arose whether ‘commerce’ includes naviga-

tion. This is how Marshal C. J. stated the problems:—

“The words are:—‘Congress shall have powers to regulate commerce with foreign nations and among several States and with the Indian tribes’. The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word.....all America understands, and has uniformly understood the word ‘commerce’ to comprehend navigation. It was so understood and must have been so understood, when the Constitution was framed”.

Despite the sweeping language of Chief Justice Marshal's opinion in *Gibbons v. Ogden* (Supra) of congressional power under the commerce clause, the Supreme Court subsequently adopted a very restrictive interpretation. The case which provided the narrow view was *United States v. Knight* 39 L.Ed. 325. The Knight doctrine that commerce was transportation and not manufacture persisted for 40 years, during which period manufacturing and mining were held not to be inter-State commerce but merely local business. Coming to the provisions in our own Constitution, it is but evident that although we have tried to avoid the difficulties that have arisen in other constitutions, the provisions in Part XIII of our Constitution are far from perfect. In article 301, trade, commerce and intercourse throughout the territory of India have been declared to be free. The question must necessarily arise as to the extent of this freedom. In fact, the very same problems are likely to arise here as in Australia, because notions about freedom may differ. Is there any significance in dropping the word “absolutely” from our Australian model? If it signifies that, freedom was to be curtailed, then to what extent? Coming to article 302 we find that Parliament has been given the

power to impose restrictions as may be required “in the public interest”. This is again a very wide and vague expression. What are the restrictions that can be imposed? At least one of the questions that looms large is the question of taxation. It seems that Parliament can impose taxation on inter-state trade if it considers it to be in the public interest. Coming to article 304, we find that State Legislatures may impose “reasonable restrictions” on the freedom of trade, commerce and intercourse with or within a State as may be required in the public interest. The words “reasonable restrictions” are bound to raise the same difficulties as they have done in that part of the Constitution which deals with fundamental rights. In *Saghir Ahmad v. The State of U.P.* A.I.R. (1954) S.C. 728 the Government of U.P. conceived the idea of running their own buses on the public thoroughfares. Firstly, it attempted to do so under the Motor Vehicles Act but later on a State Act was passed being Act II of 1951. At that time article 305 did not contain a provision for saving State monopolies and the Act was struck down and this led to the amendment of article 305, sanctioning State monopolies. Mukherjea J. said as follows:—

“Article 301 corresponds to section 92 of the Australian Constitution and is even wider than the latter inasmuch as Australian Constitution provides for the freedom of inter-State trade only.....It may be argued that freedom of trade does not, as Lord Porter observed in the Australian Bank case (1950) A.C. 235 referred to above, mean unrestricted or un-restrained freedom and that regulation of trade is compatible with its freedom. As against this it may be pointed out that the Constitution itself has provided in articles 302 and 304(b) how reasonable restrictions could be imposed upon freedom of trade and commerce and it would not be proper to hold that restrictions can be imposed ‘aliunde’ this provision in the Con-

stitution. A question also arises as to what interpretation should be put upon the expression "reasonable restrictions" and whether or not we would have to apply the same tests as we have applied in regard to article 19(6) of the Constitution".

Unfortunately, however, the learned Judges in that case left the question open and did not decide the same. It however, offers a valuable clue as to the directions in which freedom conferred by article 301 can be restricted. It seems that the restrictions must be found in Part XIII itself. Certain other principles which are well established may deserve passing mention. For example, the law which is challenged as violative of freedom of trade and commerce must be shown to be contrary to this provision, by itself. Its ulterior effect socially or economically, is irrelevant. See *James v. Cowan* (Supra). The other principle is that freedom does not necessarily mean freedom from taxation. As I have mentioned above, the germs of the power of taxation are inherent in articles 301 and 304. The subject of inter-state taxation is also dealt with in other parts of the Constitution, for example, article 286, which has been a fruitful source of litigation. In a small article like this it would be impossible to deal with the subject exhaustively. I must therefore, indicate shortly how matters stand so far as our Constitution is concerned. It will appear from a study of Part XIII of the Constitution that powers to be exercised in respect of inter-State trade and commerce have been divided between Parliament and the State. The introductory article namely, 301, confers the general right of freedom in respect of trade, commerce and intercourse throughout the territory of India. If the matter stood there, then, read with the fundamental rights conferred by Part III of the Constitution, this right would be wide indeed. Under Part III of the Constitu-

tion a citizen has the fundamental right to move throughout the territory of India freely and to acquire, hold and dispose of property in the manner he likes. He can practise any profession or carry on any occupation, trade or business of his own. Now we find that trade, commerce and intercourse throughout the territory of India is to be free. Thus, the overall picture becomes one of complete emancipation from all bondage. A man should therefore be able to proceed from the Himalayas to cape Comorin, deal in any article he likes, transport both himself and his goods from anywhere to anywhere else, without limitation and without hindrance of any sort. In practise however, this is far from being the case. A person attempting to do so will find numerous restrictions both as regards his own movement, and as regards goods that he intends to deal with, or transport, from one place to another. Perhaps the restrictions on individual movement would be least conspicuous, one might almost say non-existent. But the movement of goods is restricted in almost all the States. Wherever there is failure of crops or local scarcity, the movement of foodgrains and the like are regulated and even totally banned. The ban on movement of goods is not the least of the obstacles that may be placed in the way of inter-State trade and commerce. State taxation which may be both intra-State as well as inter-State often operates as a great deterrent to inter-State movement of goods and inter-State commerce generally. The provisions in Part XIII give the power of regulation and taxation, both upon the Centre as well as the States, and then seeks to regulate it. For example, Parliament has been given the right to impose all kinds of restrictions on the freedom of trade and commerce between States, if it is required in the public interest. In article 303 however, a restriction on this right is imposed name-

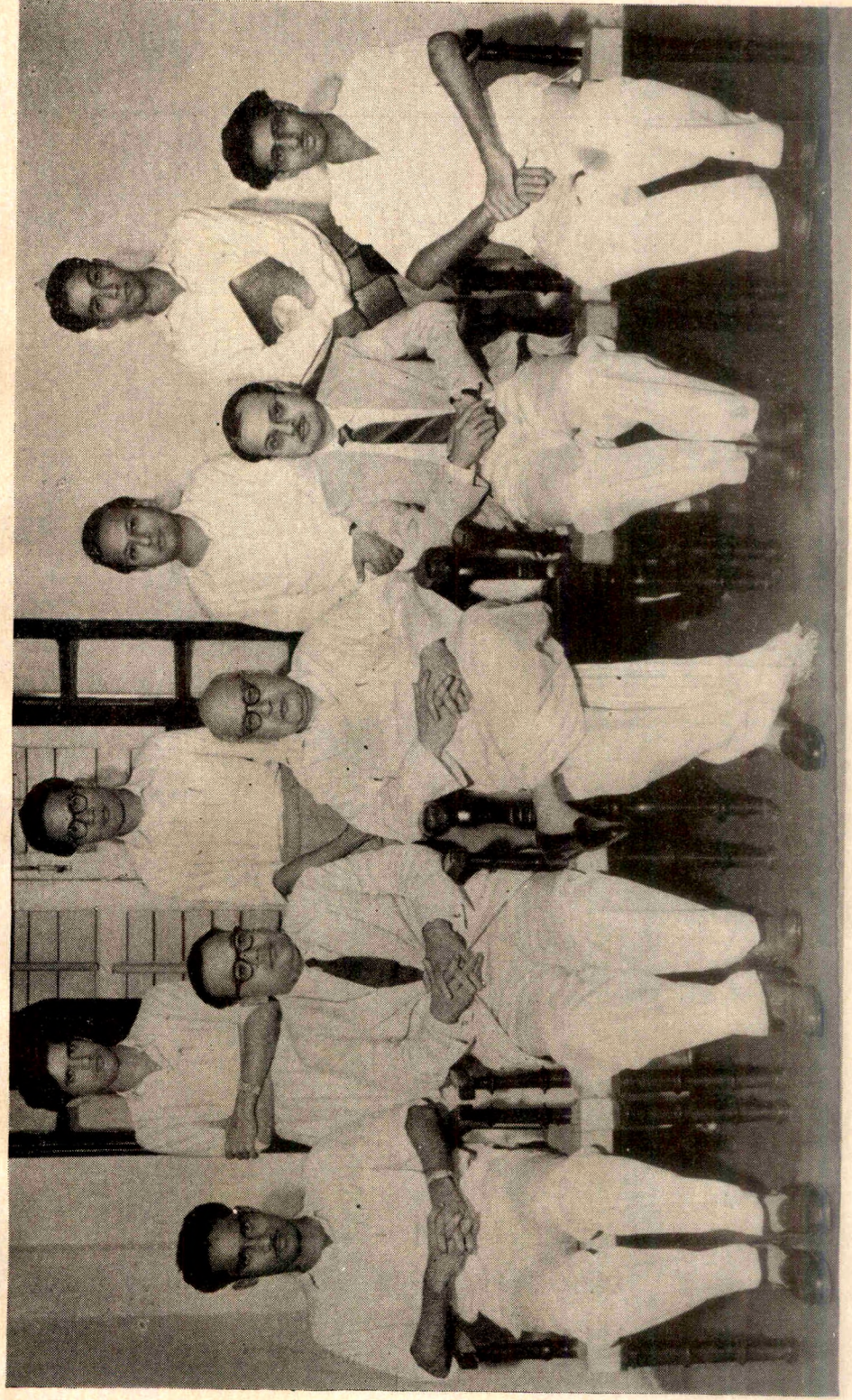
ly, that in doing so, it should not exercise discrimination except in one case only, that is to say, where there is a local scarcity of goods. Under article 304, the State has been given the power of taxation on goods imported from other States. The only restriction is that there should be no discrimination between goods imported and goods manufactured or produced in the State itself. Clause(b) of article 304 gives to the State the power to impose any reasonable restriction on the freedom of trade and commerce or intercourse with or within the State as may be required in the public interest. The only safeguard in such a case is that the previous sanction of the President would be required to a bill or amendment. We have already found that the words "reasonable restriction" have given rise to a spate of litigation in respect of fundamental rights. Like some fundamental rights, it is quite possible that restrictions may be put which will render the freedom clause nugatory. Finally, article 305 as it now stands enables State monopolies to exist, which of course, are totally destructive of free trade and commerce by a private citizen. By and large, it will be found that the prime responsibility for ensuring that the provisions of this part of the Constitution are not entirely obliterated, lies with Parliament. The idea is that it is the President and Parliament who can be entrusted to take a comprehensive view of trade, commerce and intercourse throughout the territory of India, and to save it from local impediments. Recent history has not shown that the Central Government has given much thought to this high responsibility that rests upon it and Parliament. Let us consider

article 307, which envisages the establishment by Parliament of authorities similar to the 'Inter State Commerce Commission' in the United States of America, appointed under the Inter State Commerce Act, 1887. In the United States, even prior to the Inter State Commerce Act, 1887 the Congress enacted a series of statutes for the improvement of transportation by chartering a corporation with authority to construct bridges and in the building and maintenance of rail road facilities, including chartering of inter-State carriers, creation of corporations for the purpose of building rail roads and providing for construction of connections and bridges for the purpose of facilitating inter-State commerce. By the Act of 1887, the congress began expansion of its power under the commerce clause and the courts have, from time to time, approved the constitutionality of various liabilities imposed upon carriers, particularly railways. One might mention the congressional power to prohibit discriminatory rates in the form of rebates or life passes. A power to prescribe a uniform system of accounting for inter-State carriers was also sustained. There have been other regulations, all intended to ensure the freedom of inter-State trade and commerce e.g. regulation of navigation; and regulation of communication. For example, inter State telegraphic transmission was brought within the commerce power at an early date. It is time, therefore, that greater attention is given to the subject of the freedom of inter-State trade and commerce and that it should be really made free as envisaged in article 301 of the Constitution, a freedom which, until close attention is given to the subject, might remain a mere illusion.

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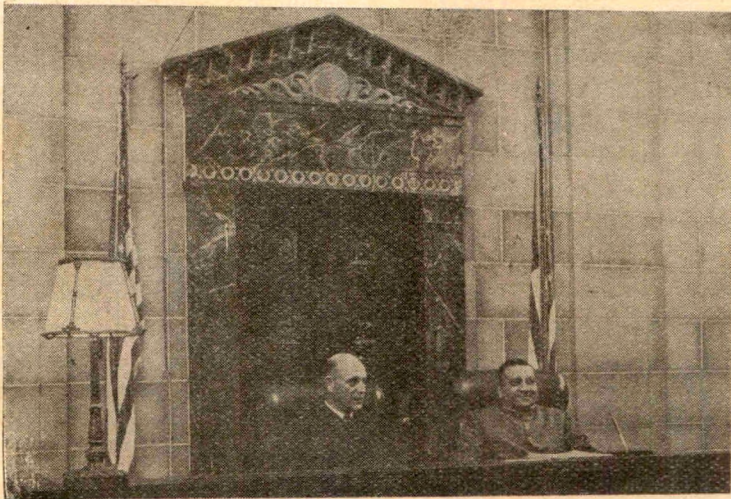
The American Legal System

By

The Hon'ble MR. JUSTICE SANKAR PRASAD MITRA

Towards the end of last year at the invitation of the American Government Dr. Pratap Chandra Chunder and I went to the United States to study the American Legal System and observe cultural institutions in that great country. Our trip which lasted for two months, started from Washington D.C. the Capital of the United States.

by Chief Justice Earl Warren the Head of the American Judiciary. He was pleased to explain to us the organisation and jurisdiction of the United States Supreme Court. At Chicago we visited the American Bar Centre and the Law School of the University of Chicago. The University is having a new building for the Law School. This



Chief Justice Chandler and Mr. Justice S. P. Mitra on an U. S. Court Bench at Oklahoma.

From there we went to Chicago, Denver, Colorado Springs, San Francisco, Grand Canyon, Phoenix, Oklahoma City, Tulsa, New Orleans, Boston, Philadelphia and New York.

At Washington we were received in his Chambers in the Supreme Court building

building will stand between the parent University and the American Bar Centre. It will have a Court Room that will be used for sessions of the Illinois Supreme Court. Speaking of the new school Chief Justice Warren has said that "this building will offer its occupants an unprecedented opportunity to enrich the conventional legal curriculum

with the spirit of scholarly achievement, the practical outlook of the organised Bar, and the day-to-day operations of one of our most distinguished State Courts. It will not merely be a one-way street between the Law School and these other segments of our profession. Benefits will flow to and from each of them. Each can pass on to the others its own strengths and receive support from them where strength is needed. It will provide the best opportunity in America for an integrated approach to the many problems that confront all of us in the administration of justice."

From Denver we were taken to Colorado Springs by the Hon'ble Leonard Sutton, a Judge of the Supreme Court of Colorado, to attend the Annual Convention of the Colorado Bar Association. There we met a large number of Judges, Jurists and Lawyers in the State of Colorado. At San Francisco we visited State and Federal Courts and met Judges at different levels. We visited the Law School in the main campus of the California University. At the University of Stanford we were received by Prof. Lawrence Ebb who with a band of young and enthusiastic workers is carrying on research on various problems of Indian Constitutional Law. At Phoenix we had long discussions with all the Judges of the State Supreme Court including the Chief Judge. In Oklahoma City the Hon'ble Stephen Chandler, Chief Judge of the Federal Court, Central District, 10th Circuit, was our host. The Oklahoma Bar Association gave us a banquet where we were made Honorary Ambassadors of Goodwill of the Cherokee Tribe of American Indians. The ceremony was performed by the Chief Judge of the State Supreme Court and one of his Companion Justices both of whom were proud of having American Indian blood. Chief Judge Chandler also invited me to sit with him on the Bench. At New Orleans we

were met at a luncheon by representatives of the Judiciary, the Church and the Municipal authority. In the City Hall we became Honorary Citizens of the International City of New Orleans. At Philadelphia we met Judge Hastie, a Negro Judge of the Federal Court of Appeal who came to India in 1956 and were also invited to luncheon by the Harvard University Alumni Association. We saw the famous Harvard Law School at the University of Harvard. The Professors whom we met, took great pains in explaining to us the system of legal teaching at Harvard.

From the above account it would be clear that we had opportunities of coming in contact with representatives of the American Judiciary, the legal profession and teachers of law at all levels to enable us to form opinions regarding the strength and weakness of the American Legal System and teaching. Indeed at the Universities of Denver and Stanford we have attended Law Classes to have an idea about the case method of teaching. It is different from the lecture system because each student has to come to the class fully prepared with the cases that would be discussed. Names are selected by lottery and the Professor calls upon the student concerned to explain the case to the class. Thereafter one question after another is put by the teacher and the students have to answer them. At last the tutor explains to the class points which have not been clearly developed or formulated. It seemed to us that the case method had its obvious advantages. The pupil is not a silent listener throughout the year attentive or inattentive. He has to make his contributions to the progress of studies every hour. But perhaps a combination of the two systems is desirable particularly for a more thorough understanding of basic principles.

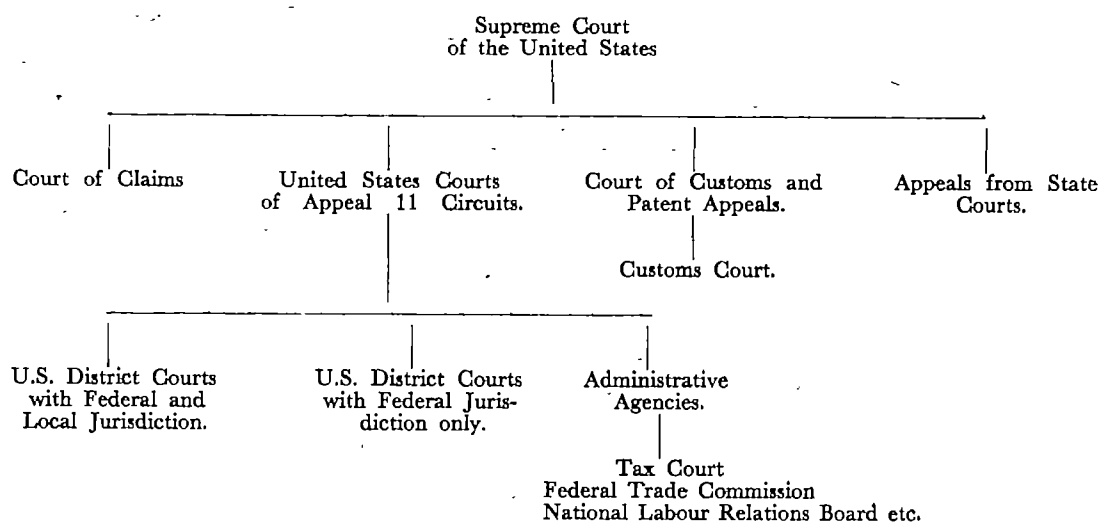
I will now proceed to describe briefly the

American Court systems. There are two sets of Judicial Systems in the United States. One is the State and Local Courts established in every State under the authority of State Governments. Each of the States has its own judicial system and its own laws. Each of these systems for all normal purposes is a self-contained unit. The State Supreme Courts can deliver judgments

from which there is no appeal. The other is the United States Courts established under the authority of the Constitution by the Congress. In this article I shall discuss the structure of the United States Courts System. The State Courts, broadly speaking, follow more or less the same pattern.

The following table would be useful for our study:—

THE UNITED STATES COURT SYSTEM.



The respective jurisdictions of the State Courts and the United States Courts are baffling problems for every American Lawyer. Generally speaking, controversies which can be decided in the United States Courts as set forth in Section 2 of Article III of the Constitution are as follows:—

1. Controversies to which the United States Government or one of its officers is a party.

2. Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming lands under grants of different

States; cases affecting ambassadors, other public Ministers and Consuls; cases between a State or the Citizens thereof and Foreign States, Citizens or subjects.

3. All cases in Law and Equity arising under the Constitution, the Laws of the United States and the treaties made or which shall be made under the authority of the United States and all cases of admiralty and maritime jurisdiction, cases involving the Constitution, Laws of Congress and treaties or laws relating to navigable waters.

The Constitution declares the classes of cases that may be tried in the United States

Courts. The Congress can and has determined that some of these cases may also be entertained by the State Courts but the others shall be tried only in the United States Courts. With some exceptions cases under the Constitution or the Laws of the United States or between citizens of different States may be determined by the United States Courts if the amount involved exceeded \$ 3000 and even then may be tried in either the States' or the United States Courts. Maritime cases and Suits against ambassadors or Consuls can be tried only in the United States Courts. When a State Court has decided a case which involves Federal Law, its decision may be reviewed by the United States Supreme Court.

The highest Court in the land is the Supreme Court of the United States. It has now nine Judges appointed for life by the President with the approval of the Senate. The Chief Justice receives a salary of \$ 35,500 a year. The other Judges receive \$ 35,000 a year. The main officers appointed by the Court are a clerk to keep its records, a marshal to maintain order and enforce its orders, a reporter to publish its opinions and a librarian to serve the Judges and the Members of the Supreme Court Bar. The Court sits from October to June. It disposes of nearly 1,800 cases a year. Most of the cases are disposed of in conferences of the justices on the ground that they are not either proper or of sufficient importance to be reviewed by the Supreme Court. About 200 cases are decided on merits and about half of these decisions are announced "in full public opinions". The Rules of the Supreme Court have made elaborate provisions for submissions of written arguments and statements of cases by the parties. These arguments or statements are considered by the justices in their conferences. When the matter is heard there is

time limit for oral arguments to be advanced on behalf of each of the parties. No Lawyer is usually allowed to continue beyond the time prescribed for him. Often oral arguments take the form of questions from the Members of the Bench and answers by the Lawyer concerned. Of the U.S. Supreme Court it has been rightly observed that "the black-gowned Justices listen attentively to the oral arguments in each case, putting sharp questions from time to time, but they pay even more careful attention to the scholarly written briefs submitted by the parties". In the Appellate Courts all over the United States, we were told, more or less the same system is followed. The amount of time that is saved at the hearing by this procedure can easily be appreciated.

Under the United States Supreme Court there are 11 Circuit Courts of Appeal. Each Circuit includes three or more States except the District of Columbia Circuit. Each Court has between 3 and 9 Judges depending on the amount of work. The Judge with the longest service is the Chief Judge. Each Judge receives a salary of \$ 25,500 a year. The 11 Circuit Courts of Appeal receive about 4,000 Cases every year. A person aggrieved by the decision of a District Court usually has a right of appeal to the Court of Appeal of his Circuit. These Courts also receive cases for review of actions of the Federal Administrative Agencies restricted, however, to errors of law.

The cases are initially tried in the District Courts. Each District has from 1 to 18 Judges depending on the volume of work. For each District there is a clerk's office, a United States Marshal's office and one or more referees in Bankruptcy, probation officers, court reporters and United States Commissioners and a United States Attorneys' office. The salary of a District Judge is \$ 22,500 a year. The District

Courts receive about 62,000 Civil cases, 28,000 Criminal cases and 74,000 Bankruptcy cases every year.

In the District of Columbia and Alaska, the Canal Zone, Guam and the Virgin Islands the Federal Government does not share Judicial Power with the State Governments. The District Courts in these places decide all types of cases. The Judges of these courts save in the District of Columbia, are not appointed for life but for a term of years and are not protected against diminution of their salaries during their term of office. These Courts may also be given duties which are not strictly judicial.

The Court of Claims, the Court of Customs and Patent Appeals, and the Customs Court are special Courts created by the Congress. The Court of Claims consisting of 5 Judges appointed for life, hears suits on claims against United States. The Court of Customs and Patent Appeals also has 5 Judges appointed for life to hear appeals from the Customs Court, the Tariff Commission and the Patent Office. Appeals may be preferred against the decisions of these two Courts to the United States Supreme Court. The Customs Court has 9 Judges appointed for life to determine controversies relating to classification and valuation of imported merchandise.

The Constitution of the United States merely provides that the Judicial Power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. The various courts other than the Supreme Court described above, have been established by the Congress from time to time.

The United States Constitution proclaims equality and independence of the Judiciary. The Federal Judges are appointed by the

President with the advice and consent of the Senate but their independence is secured in three ways. Firstly, the United States Courts can be called upon to exercise only Judicial Powers and perform only Judicial work. Secondly, the Federal Judges hold their offices during good behaviour as long as they desire. They can be removed only by impeachment. Thirdly, the Constitution provides that compensation of the Federal Judges shall not be diminished during their continuance in office. In the State Courts, however, Judges are not appointed but elected for a term of years. Wherever we have travelled in the United States numerous Lawyers expressed the feeling that the system of election of Judges to the State Courts was not satisfactory. They were anxious to know how Judges were appointed in India. When they were told that a High Court Judge in India was appointed by the Central Government in the name of the President on the recommendation of the Chief Justice of the High Court concerned and with the approval of the Chief Justice of India and Judges of the Supreme Court are appointed on the recommendations of the Chief Justice of the Supreme Court, they felt that this was an ideal system. There is, however, strong popular opinion in favour of electing Judges to the State Courts. At Colorado Springs we were told that an attempt was being made to evolve a new system in consonance with this popular feeling. The idea is to have a panel of names out of which the Governor of the State will make an appointment. The person appointed after some time, would face the electorate without any rival and the electorate would be given a chance to express its view as to whether the person concerned, should be retained. Many Lawyers thought that this would be a better system although it was a compromise between two extremes.

The United States Courts are governed

by Judicial Councils and Judicial conferences in each of the 11 Circuits and by the Judicial conference for all the Circuits. The Judges of the Courts of Appeals form the Judicial Councils. They have power to take steps (including assignment of Judges) to dispose of properly the volume of cases in each District. The Judicial conferences in the Circuits consist of District and Circuit Judges. They sometimes invite Members of the Bar to discuss common problems. The Judicial conference of the United States consists of the Chief Justice of the United States, the Chief Judges of the 11 Circuits, the Chief Judge of the Court of Claims and a District Judge from each Circuit chosen for a term of three years by the Judges of the Circuit at an Annual Judicial Conference. The conference meets at least once a year to deal with administrative problems in all the circuits.

The Judicial Conference of the United States declares policy and prepares plans and suggestions for the various Courts "in the interest of uniformity and expedition of business". The Judicial Councils are charged with the authority and responsibility to make "all necessary orders for the effective and expeditious administration of the business of the Courts within the circuit".

The Law that is applied in the United States Courts in Suits between Citizens of different States, is the same as the Law which would be applied in a State Court.

The Courts in America are faced as in our country with problems of delay and congestion. Addressing the 81st Annual Meeting of the American Bar Association at Los Angeles on the 25th August 1958 Chief Justice Earl Warren said that "interminable and unjustifiable delay in our Courts are to-day compromising the basic legal right of countless thousands of Americans and, imperceptibly, corroding the very foundations

of constitutional Government in the United States. To-day, because the legal remedies of many of our people can be realised only after they have swallowed with the passage of time, they are mere forms of justice. And, to the extent that this is so, there is created a disrespect for law at a time when every one should be continually conscious of the fundamental principle that it is primarily the law and its adequate enforcement which makes individual liberty possible". Chief Justice Warren quoted the late John J. Parker, Chief Judge of the Court of Appeals for the 4th Circuit who said "if democracy is to survive... in the contest with foreign ideologies and systems, it must be able to demonstrate its efficiency; and nowhere is this efficiency more important than in the fundamental matter of administering justice. The administration of justice is the Lawyer's business; and to see that the business is conducted with efficiency, is one of the most important duties that confronts him".

The United States District Courts are saddled with a back log of 70,000 cases. About 40% of all civil cases in Federal District Courts are subject to undue delay from one to four years between the dates of issue and trial. The Judicial Conference thought that normally it should take six months between the time of filing and the date of trial for an ordinary case. Only seven out of 94 Districts, met this standard in the fiscal year 1958.

Throughout the United States we had noticed a growing realisation amongst Judges and Lawyers that the problems of delay and congestion must be effectively tackled. There have been a number of recent legislations on Federal levels to improve the administrative efficiency of the Courts. I shall give a few instances. The Rules Bill was signed by the President on the 11th

July 1958. The Judicial Conference of the United States considered that the Rules of Practice and Procedure in the Federal Courts should be under constant study and re-examination and proposals for revision should be recommended whenever conditions warranted such revision. This Bill authorizes the Judicial Conference to recommend appropriate revisions to the Supreme Court for its consideration and possible adoption. It is believed that this plan would give ample opportunity for participation of the Bench and the Bar generally as well as legal scholars. The second new enactment that should be mentioned is the Diversity Bill. This Bill increases the jurisdiction amount in Diversity cases from \$3,000 to \$10,000. It changes corporate citizenship for the purposes of diversity jurisdiction to provide that a corporation is a citizen of both the State of Incorporation and its principal place of business. It prohibits removal of Workmen's Compensation Cases from the State to the Federal Courts. The third new law of importance is P.L. 85-593 signed by the President on August 7, 1958. This Bill provides that the Chief Judges of Circuit and District Courts should be relieved of the burdens of administrative duties upon reaching the age of 70 years. This Bill also was proposed by the Judicial Conference of the United States. In the Criminal field P.L. 85-752 was signed by the President on August 25, 1958. This measure provides, *inter alia*, for the establishment of institutes on sentencing procedure to which Federal Judges, Prosecutors, Probation Officers and other specialists will be called to discuss ways and means for improving sentencing practices throughout the Federal Courts. This would prevent inequities that are caused by wide disparities in criminal sentences.

We were told that since 1905 the number of Civil cases filed each year in the Federal Courts had increased 400% whereas the

number of Judges had increased a little more than 200%. Obviously it was felt that even with a high peak of administrative efficiency the only solution possible to relieve the delay was the creation of additional permanent Judgeships to meet the shortage in judicial man power.

Another method which is extensively tried in the Federal Courts is the pre-trial procedure. The procedure is considered to be "an important tool of judicial management". It was explained to us by a Professor at the University of Chicago. After a suit has been filed a Judge having jurisdiction, will meet both the parties and try to ascertain the real disputes between them, on the basis of which Issues may be framed. Attempts are also made to persuade the parties to come to an amicable settlement. In a large percentage of cases suits are settled in the pre-trial conference. If they are not settled, they would be ultimately tried by another Judge. Two Federal Judges in New Orleans, it is said, are disposing of on an average 1,200 civil cases each year largely because of the effective use of the pre-trial conference. The Professor who explained the pre-trial procedure to us, frankly stated that although various steps are being taken to relieve congestion, it could not be said that the most effective remedy has yet been discovered.

We saw a Juvenile Court and a Juvenile Hall in Denver. These are conducted by Judge Philip Gilliam one of the greatest authorities on juvenile delinquency, a very serious problem in America. These are unique institutions. Their workings were explained to us by the Judge himself. He also invited us to observe some of the proceedings of the Court. The philosophy of the Court is "that Rules of Law and Legal Principles alone cannot provide an adequate solution to delinquency and cannot cure a

troubled family situation. The Juvenile Court recognises that the State or its agent, the Court, is the ultimate parent of all minors and that the welfare and preservation of the family unit is necessarily a concern of the State. In the juvenile and family court, the law is designed to meet the problems of the minor. This is accomplished by a procedure unique to the Juvenile Court, a procedure which embodies separate and informal hearings for minors, probation and counseling services, physical and mental examinations of youthful offenders, special court records, both legal and social, and detention facilities for minors separate from adults. The Court considers juvenile and family questions only after a full and impartial investigation has been made; an investigation designed to discover the source of the youngster's problems. Many factors, including the family background, physical and mental condition, home life, friends, schooling and other pertinent matters, are thoroughly investigated and considered before any decisions are made by the Court. The procedure of the Court is based upon the philosophy of its pioneer father, Judge Lindsey, who believed that the Juvenile Court must recognise delinquent children not as criminals but as misguided and misdirected youngsters, needing not punishment, but aid assistance and encouragement."

Children under the age of 18 are referred to the Juvenile Court by the signing of a petition alleging delinquency. This is filed in the interest of the child and not against him. The proceedings that we watched and the Juvenile Hall that we visited with its elaborate arrangements for games, recreations and studies and the friendly and sympathetic treatment of the delinquent by the persons in charge of the Hall convinced us that the philosophy of the Juvenile Court was being fully realised. The Juvenile Hall

of detention appeared to us to be an ideal home for the delinquent with all the modern comforts and amenities.

I shall now briefly describe the procedure of a trial before an United States District Court. Both Civil and Criminal Cases are tried by the Judge and a Jury. In a Civil case the plaintiff states his claim in a paper called the "Complaint". The defendant's reply is called the "Answer". The Complaint and the Answer are the main pleadings in the case and issues of Law and fact are framed on points upon which the parties disagree. The issues are often settled in a pre-trial conference. When a case is called on for hearing, a panel of jurors is summoned from whom 12 are selected to try the case. In some cases the parties may agree to have less than 12 jurors. There may also be alternative jurors to take the place of those who may fall ill during the trial. The members of the panel are sworn to answer questions about their qualifications to sit as jurors. The process of questioning is called the *voir dire*. This examination of the jurors is conducted by the Judge or the counsel or both. The examination opens with a short statement of the case. Questions are then asked to ascertain whether any of the jurors has any personal interest in the case or knows any reason why an impartial verdict cannot be rendered by him or whether any of them is related to or personally acquainted with the parties. Other questions may also be asked to determine whether any member in the panel has any prejudice or feeling that might influence him. Parties on either side may also ask that a member of the panel be excused. These requests or demands are called "challenges". A person may be challenged for cause if the examination shows that he might be prejudiced. There is no limit to the number of *challenges for cause*. A party is also entitled to a limited number of challen-

ges for which no *cause* is necessary. These are known as "*Peremptory Challenges*". In a Civil case each party has three Peremptory Challenges. A Juror's elimination by a Peremptory Challenge is no reflection upon his ability or integrity. In some courts Peremptory Challenges are made in the presence of the jury. In other Courts they are made from list of the jurors. When the challenges are over oath is administered to the Jurors. The trial then proceeds in six stages which are as follows:-

1. The opening statements of the lawyers for the parties. These are sometimes omitted with the permission of the Judge.
2. The plaintiff calls witnesses and produces evidence to prove his case.
3. The defendant calls witnesses and produces evidence to disprove the plaintiff's case and to prove the defendant's case.
4. The plaintiff may call witnesses to disprove what has been stated by the defendant's witnesses.
5. Arguments are made by the lawyers for the parties.
6. The Judge instructs the jury as to the law and may also advise the jury on the facts.

Needless to mention that witnesses called by either side, may be cross-examined by the lawyer on the other side.

Throughout the trial the Judge may be asked to decide questions of law in the presence of the jury *e.g.*, questions concerning objections to testimony.

The charge of a judge to the jury is not a mere statement of the rules of law. It is also a statement of the facts in dispute and the Judge may comment on the weight to be given to the evidence. The Judge will try to direct the Jury's attention to the

real merits of the case. His task is to sum up the evidence impartially bearing on the questions of facts. He will state the law relating to the facts before the Jury.

The procedure in a Criminal case is more or less the same except that the United States Government always begins the case. The person charged is the defendant. The charge may be brought either by an indictment or by an information.

An indictment is a written accusation by a Grand Jury. It charges the defendant with committing an offence against the law. Each offence is set forth in a separate count of the indictment.

An indictment by a Grand Jury is a decision of at least 12 out of a group of 16 to 23 citizens of the District. The Grand Jury hold closed sessions where the United States Attorney presents the Government's evidence. The Grand Jury returns an indictment to the Court, if it believes that a crime has been committed, and there are reasonable grounds to believe that the defendant is guilty of it. The defendant has the right to present his evidence at the trial in open court before the Judge and the *petit Jury* or trial Jury.

An information is a written charge against the defendant filed by the United States Attorney and not by the Grand Jury. In a case where the defendant has the right to have a *Grand Jury to consider* the charges against him he may give up that right and consent to the filing of an information.

After the indictment or information is filed the defendant appears in open court and the charge is made known to him. He is asked whether he pleads "guilty" or "not guilty". This procedure is called the *arraignment*.

Criminal cases are tried when the defendant pleads "not guilty" by a Jury of 12

persons. The defendant and the Government may give up their right to a Jury or agree to less than 12 Jurors.

The Jury must consider separately each of the charges against the defendant. Sentencing is the function of the Judge alone. The rest of the procedure is generally the same as in Civil cases.

In some districts the foreman of the Jury is selected by the Judge. In other districts the Jurors elect their foreman and in still others the first Juror to enter the Box becomes the foreman.

In a Criminal case all Jurors must agree on the verdict. That is also required in a Civil case unless the Court otherwise directs.

Except in the State of Louisiana which has a Civil or Code Law, the American Legal system is based on the principles of English Common Law. In a recent address to the University of Chicago the Rt. Hon. Viscount Kilmuir of Creich, Lord Chancellor of Great Britain, has explained these principles in these words:—

"The first, to me, of these principles, is the pre-eminence of justice. To the common lawyer, justice is more important even than the truth. One need not go so far as the Irish defendant, who, asked whether he was guilty or not guilty, surprised the Judge with the reply: 'And how should I be knowing whether I am guilty or not until I have heard the evidence'. But, the necessity that a crime should be proved, and a case established by admissible evidence, fairly obtained and adduced by the person charging or claiming, comes before everything else. The second principle is, if I may use a well-worn expression, the acceptance of the Rule of Law. I need not try, ..., to elaborate what Dicey meant by this classic phrase, but at least it

means this: that every one, official and private citizen, is answerable in the ordinary courts for the legality of his actions. The third principle of the Common Law is that there must be, in a democratic State a body of men whose opinion the ordinary citizen will willingly accept as a substitute for his own view of his own rights. If Judges are to be so accepted the Common Law insists that they must have at least three qualities. First, they must be independent of the executive, and as far as possible removed from Parliamentary pressure. They must be judged (I repeat, judged) by public opinion as able to hold the scale of justice even, between the State as prosecutor and the accused, or between subject and subject. Second, they must have and display objectivity. The Common Law functions on the plan that justice can best be achieved if the Judge remains apart from the conflict and ensures a fair trial by his impartiality. He must free himself as far as is humanly possible of his own prejudices and pre-conceptions. Lastly, they must be capable of maintaining by their conduct and reputation the tradition that the office of Judge carries an unparalleled trust and confidence. So long as this tradition endures, the words of brilliant men will derive an added weight from their office, and the office itself will continue to attract brilliant men. The fourth principle of the Common Law is that it never forgets or neglects the ordinary citizens. Its standard is that of the reasonable man. Its working depends on the thousands of lay men and women who give their help to solve problems of facts as Jurors, and the thousands of unpaid lay Magistrates who in England, give up their time and take endless trouble to try over ninety-seven per cent of the Criminal cases. The citizen is essentially part of the administration of justice and therefore, supports it."

The opportunities that we had in observing the American Legal system convinced us that these high principles of Common Law are sought to be rigidly adhered to in the administration of justice in the United States.

The pronouncements of the United States Supreme Court, it is well known, have changed from time to time the course of American life and history. This Court, it is said "acts as a symbol of the American ideal of liberty under the law". In *Marbury vs. Madison*, 1 Cranch 137 decided in 1803, Chief Justice Marshall claimed for the Supreme Court the power of judicial review of the Acts of the Congress. He said that "certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the Nation, and, consequently, the theory of every such Government must be, that an act of the legislature, repugnant to the Constitution, is void." In *Ex parte Milligan* 4 Wall. 2, it was unanimously decided in 1866 that Military Courts had no right to try civilians for offences in the theatre of operations if the Civil Government had not been deposed and Civil Courts were open and functioning. The decision re-affirmed the "birth right of every American citizen, when charged with crime, to be tried and punished according to the Common Law." Both the Military and the President are controlled by Law and have their appropriate spheres of duty which cannot be exceeded. In *Ex parte Yarbrough* 110 U.S. 651, the Supreme Court upheld in 1884 the power of the Congress to punish as a crime against Federal Law interference with an American citizen's right to vote in a Federal election. In *West Coast Hotel Co. vs. Parrish* 300 U.S. 379 Chief Justice Hughes affirmed in 1937 the validity of laws relating to minimum wage. To-day a Federal Minimum Wages Act guarantees a

wage of not less than \$1 per hour for workers employed by business engaged in inter-state commerce. *Helvering vs. Davis* 301 U.S. 619 was decided in 1937. It upheld the provisions regarding the old-age benefits in the Social Security Act. It was thought that to provide economic security for the aged was to promote the general welfare. Old-age pensions now cover virtually the entire employed population of the United States. *National Labour Board Relations vs. Jones and Laughlin Steel Corporation* 301 U.S. 1 also decided in 1937 guaranteed the workers the right of collective bargaining through representatives of their own choice. The court followed the principle that as between two possible interpretations of a Statute, by one of which it would be unconstitutional and by the other valid, the duty of the court is to adopt that which will save the Statute. The employers were prevented from interfering with the formation of Labour Unions. To-day one-fourth of America's total labour force belong to Trade Unions. In 1954 was decided the famous case of *Brown vs. Board of Education of Topeka* 347 U.S. 483, 349 U.S. 294 banning racial segregation in American Public Schools. The Court directed the Federal District Courts to take steps to achieve integration of public schools "with all deliberate speed." We found in New Orleans a pronounced discontent against this decision of the Supreme Court. But it appeared that those who were offering resistance, were fighting a losing battle. In 1958 *Mallory vs. United States* safeguarded the right of the individual against police infringement of his basic rights. It was held that any confession which the police may obtain during an unnecessary delay between arrest and arraignment would be inadmissible in a criminal trial. These are but a few of the U.S. Supreme Court's decisions involving the development of American de-

mocracy but they illustrate the role of the judiciary in the American system of Government.

I have in this article endeavoured to give a resume of the structure and functions of America's National Judiciary for the students. My impression is that many of the rules and practices of the American system can with suitable modifications be applied to our system for the betterment of our judicial administration. Recently our Supreme Court has drawn on the experiences of the U.S. Supreme Court and has made important changes in its rules. There would be more elaborate statements of cases and drastic reduction of oral arguments.

We visited a number of Law Firms in different parts of the United States. There is no dual system in America. All Lawyers are Attorneys and are either partners in firms big or small or junior assistants in these firms. The American Bar Association is a National body which exercises a profound and far-reaching influence not only on the legal profession but also on the Acts of the legislature and public life in general. American Lawyers showed considerable interest in the Indian legal system and I believe closer contacts with them would be beneficial both to India and the United States.

"There is a written and unwritten law. The one by which we regulate our constitutions in our cities is the written law; that which arises from custom is the unwritten law."

Leadership of Lawyers and Jurists in movements for Liberty and constitutional Government

By

RUSH H. LIMBAUGH*

The republics of India and the United States of America are each committed to the cause of Liberty and the practice of Constitutional Government. By virtue of these commitments, these two great nations stand among their contemporaries as representatives of democracy in the modern world. Although they are geographically almost halfway around the earth from each other, they have these common bonds of aspiration and purpose which unite them in worthy and noble comradeship.

The concepts of liberty and the institutions of constitutional government prevailing in these two countries have evolved from centuries of human experience in many different nations, and in them is encompassed the achievements of great movements for social, religious, economic and political growth and reform which have shocked the

conscience of men and disturbed the equilibrium of history in different periods of the progress of mankind. It should be of more than passing interest and, indeed, a constant challenge to the members of the legal profession in these two democratic nations, as well as to lawyers throughout the world, that men who have been trained in the law and who were, in their time, active members of the bar or of the judiciary furnished the organizing skill and genius and contributed effective and dedicated leadership for the success of these age-shaking movements for freedom and democratic government.

In this article we shall reexamine incidents connected with some of these movements, consider the current significance of some of their results, and mention some of the notable contributions made by men of the law to such movements as they have occurred in England, in the United States of America and in India.

I. England

The rise and progress of English liberty and the forging of the celebrated instruments constituting her constitutional structure¹ were coeval with the emergence and advancement of the legal profession of Eng-

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¹ England does not have a written constitution in the sense that India and America and other nations having constitutional government have written constitutions. But the Magna Carta and certain acts of Parliament passed subsequent thereto and identified with great fundamental rights and liberties are usually referred to, and they shall be referred to here, as parts of the English Constitution.

land and with the origin and development of her legal and judicial systems. That they occurred contemporaneously could be disregarded as a mere coincidence of history. Nevertheless, it cannot be successfully gainsaid that in the setting of the great landmarks in the progress of English liberty and constitutional development the members of the bench and bar were zealous and skilled workmen.

1. The Ages of Glanvill and Bracton and Magna Carta.

In June, 1215, the barons of England met King John at Runnymede for a series of conferences to determine the exact provisions of an agreement under consideration by them and the King as to the law of the land. An instrument in writing was drafted to evidence that agreement. It was written in Latin. It was signed by the King. It was called Magna Carta.² The name of the instrument in English is the Great Charter. In the English-speaking world it is considered the foundation for the principle that, for the security of the liberties of the people, the law is superior to the will of the king.

Magna Carta was written long before philosophers, political scientists and legal scholars had probed into the essence and the elements of human liberty and before the sources of political power had been defined and classified in terms of their present usage. The subject peoples of the king acquiesced in the prevailing doctrine that legislative power was vested in the king. They demanded that he exercised that power by

donating to or granting them a treaty expressing the law. The charter is in the form of a grant by the king "to all freemen of this our realm, these liberties following, to be kept in our kingdom of England forever."

The liberties referred to are set forth in fifty-seven divisions called chapters, some of which were personal, and related to tenure and property, marriage, debt and service. By them it was provided that no aid or scutage could be required of them, except when passed upon by the common council of the realm, thus transferring to them the right of national assembly. The City of London was to have all the ancient liberties and customs it had enjoyed, and other cities and towns were to have similar rights. The charter provided that "no free man shall be taken or imprisoned or disseized or outlawed or exiled or in anywise destroyed, save by the lawful judgment of his peers or the law of the land." It set forth regulations for the administration of justice and it contained a covenant that the king would not sell, deny or delay justice.³

Magna Carta was not throughout a new statement of the law. In fact, it has been said that it contained little that was new but that it confirmed or restored the law already existing and which the king had lately violated.⁴ "Every one of its brief sentences is aimed at some different object and is full of future law."⁵ Four centuries and more after it was first promulgated, and at an hour of constitutional crisis in the English Parliament, it was said of the Great Charter that it had been confirmed and re-

² This document is well known in name by lawyers in English-speaking countries for its historic importance in the evolution of the concept of liberty and the rule of law. When it was originally issued enough copies were supplied for distribution to the churches. It is said that only four of the originals are in existence. Two are in the British Museum and one each is in the Cathedrals of Lincoln and Salisbury.

³ Magna Carta, c. 39, 40, 45.

⁴ 1 Pollock and Maitland, *History of English Law* (2d Ed.) 172; 1 Reeves, *History of English Law* (Finlason Ed.), Chapter V.

⁵ 1 Pollock and Maitland, *Ibid.* 171.

confirmed "by thirty good Kings and thirty good Parliaments."⁶

It could not be expected that a document of such basic and enduring significance in the annals of liberty and government could have come into being except as a result of long and bitter experience and deliberate and skilled craftsmanship. King John had succeeded Richard. Oppressive government had followed the more orderly times of Henry II, when permanent foundations had been laid for the enforcement of a body of law through a system of courts of justice. A treatise on the law had been written during Henry's reign and Ranulf Glanvill, a sheriff and a justiciar for the king, was credited with its authorship. The time became known in the history of English law as the age of Glanvill. It was the beginning of the recorded history of the law and the administration of justice. Through the activities of the lawyers and the courts, the people had become familiar with the ancient customs prevailing in a free and peaceable society. To them the law had become tangible and real. Even the king must recognize and abide by the law.⁷

This was the immediate purpose of the Great Charter. It was a restatement of the principles of liberty to which Englishmen had become accustomed and of the law under which they felt entitled to take refuge. In Chapter 18 it was ordained that the king would appoint for service on the courts only those who know the law. Those who drafted the charter were not only themselves familiar with what the law was and with the processes of the courts through which the law was applied, but they also prepared the way by which in the age of

Bracton, one of the great justices of the Kings Bench of the following generation, the doctrine that the king is below the law became permanently established.⁸

2. The Age of Coke and the Petition of Right.

In the course of English history after the adoption of the Great Charter the liberties of the people were further protected by the rise of parliamentary government and the gradual transfer of additional legislative power to the House of Commons. Concurrently with parliamentary ascension the doctrine of judicial independence emerged, and in the time of Chief Justice Coke, one of the most aggressive champions of the liberties of the people under the protection of the law administered by fearless and capable judges, the importance of an independent judiciary came sharply to the public notice.⁹

But against these forces in the struggle of liberty against authority the brazenness and obstinacy of the monarchy occasionally reappeared. A new climax in this struggle occurred in the reign of Charles I. He resorted to attempts to raise money without the consent of Parliament and against the letter and the spirit of the law, and he arbitrarily imprisoned those who refused to pay. He imposed martial law and excluded from Parliament some of its most prominent members.

Against this usurpation of power there arose a movement in Parliament under the leadership of former Chief Justice Coke which resulted in the adoption of the Petition of Right, acknowledged as one of the additional constitutional documents protect-

⁶ Catherine Drinkwater Bowen, *The Lion and the Throne, The Life and Times of Sir Edward Coke*, 484.

⁷ Pollock and Maitland, Chapters VI and VII, pp. 136-225.

⁸ *Ibid.*; 1 Reeves, Chapter V.

⁹ *Ibid.*; Bowen, Parts II and III, *The Judgeship and the Parliament Man*, pp. 277-472.

ing the liberties of the realm.¹⁰ By the Petition of Right the principles of liberty, now centuries old, were reconfirmed. The Petition was the product of lawyers and it marked another step in the decline of the monarchical power.¹¹

3. Habeas Corpus and the Bill of Rights.

In the further struggle for freedom from monarchical usurpation, extending across the period of the English Revolution of 1688, two additional triumphs were achieved in the adoption of the Habeas Corpus Act in 1679 and the Bill of Rights in 1689. By the Great Charter progress in personal liberty was attained through the provision forbidding imprisonment contrary to law. But lawyers had witnessed the nullification of that provision by abuses of illegal arrests and unlawful imprisonment. By the device of the extraordinary writ of habeas corpus they had, in specific instances, secured the release of victims of these abuses. But they insisted that the right to freedom from false arrest and illegal imprisonment was one of the personal freedoms that was entitled to such constitutional recognition as was afforded by English practice. Conceived, formulated and used by lawyers and judges, the remedy of release from illegal arrest and imprisonment was made effectual in the advance toward freedom in the adoption of the Habeas Corpus Act. It has been claimed for this constitutional instrument that it had the effect of abolishing the feudal system, and the celebrated Blackstone has referred to it as "that great bulwark of our constitution."¹²

Adopted at the termination of the Revolution, the Bill of Rights largely confirm-

ed that which lawyers and judges had already considered to be the law. It was called "An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown." It had the effect of abolishing the doctrine of the Divine Right of Kings. And, as observed by Blackstone, it also had the effect of making "the judges completely independent of the king, his ministers, and his successors."¹³

II. *The United States of America*

1. Provincial Beginnings.

The colonial era in United States history extends across the period from the first settlements at Jamestown in Virginia, in 1607, and at Plymouth in Massachusetts, in 1620, to the beginning of the Revolution, in 1775. During that period people from England, Scotland, Ireland, Germany, Holland, Sweden and other nations migrated to America, established thirteen colonies, laid the foundations of American civilization and increased in numbers to four million. Separated from political and religious persecutions to which some of them had been subjected in their homelands, and released from all legal responsibilities due the governments under which they had formerly lived, except those implicit in the colonial charters granted by the Crown of England, they plunged into the self-disciplining tasks of frontier life and emerged out of a status of provincial dependence into societies composed of people with a growing sense of self-sufficiency, liberty and stability.¹⁴

Among the permanent additions made to the general structure of American life during the provincial period was the establish-

¹⁰ 4 Blackstone, Commentaries on the Laws of England, 430.

¹¹ Bowen, 498.

¹² 4 Commentaries, 431.

¹³ *Ibid.*, 433.

¹⁴ Among the multitude of books concerning this period, that of Charles A. Beard and Mary R. Beard, *The Rise of American Civilization*, is helpful and authoritative.

ment of a body of law, a judicial system and a legal profession. The early colonists were distrustful of lawyers and entertained hopes that a system of law applied by courts would be unnecessary in a free society.¹⁵ This aversion for law and lawyers, which some of the English colonists brought with them from their homeland, persisted for several years and it was, in some instances, evidenced by statutory restrictions against legal practice.¹⁶ But as life became more complex, as commerce and business increased and as problems of government multiplied, the need of law and the necessity for lawyers became manifest. The colonial charters required that the law enacted by colonial legislatures conform with the common law of England, and, since the colonists were familiar with the common law, Virginia took the lead in adopting it, and other colonies in later years took the same course.¹⁷ A system of courts was established in different colonies during the provincial period. These were partially fashioned after the congeries of courts existing in England and they were, to some degree, adapted to the conditions and other institutions prevailing in the colonies.¹⁸ For a long time, laymen served as judges of the colonial courts, and knowledge of the law was not made a prerequisite to judicial service until after the end of the colonial period.¹⁹

It was inevitable that a legal profession of trained men should appear on the colonial scene. Law and courts could not serve

their function successfully without capable lawyers. In different periods such lawyers began to appear, and, during the years immediately preceeding the Revolution, there was a bar of able lawyers in all the colonies. Some of them had received their education at English universities and at the Inns of Court in London. Others were educated in American universities and under American professors of law. Many received their legal knowledge only by reading the law. The times called for that type of private and public service lawyers were prepared to render, and as popular feeling for liberty increased lawyers became more in demand.²⁰ They furnished leadership for setting the fires of revolution, and they contributed materially to the patience, the genius, the wisdom and the faith which kept those fires in control.

A century before national independence Nathaniel Bacon, a young lawyer from England, in an abortive rebellion, led a popular movement against aristocracy.²¹ In 1735, Andrew Hamilton, venerable lawyers of Philadelphia, stood in defiance of an arbitrary provincial governor in the Courts of New York, and won a verdict of a jury vindicating the right of an editor to publish the truth about a public official, and permanently establishing in America the principle of the freedom of the press.²² In 1763, in a country court house in Virginia, Patrick Henry, a zealous and fearless young lawyer,

²⁰ 1 Beard, *The Rise of American Civilization*, 100-103.

²¹ In his 1 *The Life of John Marshall*, 6, n. 3, Senator Albert J. Beveridge says: "Bacon's Rebellion deserves the careful study of all who would understand the beginnings of the democratic movement in America." See also Robert Douthat Meade, *Patrick Henry*, 30.

²² *State of New York v. John Peter Zenger*, 16 *American State Trials*, 1-39. [In this celebrated trial, the defendant, who came to America from Germany and published the *New York Weekly Journal*, a crude four-page folio-size newspaper,

¹⁵ Charles Warren, *History of the American Bar*, 3-18; Roscoe Pound, *The Lawyer from Antiquity to Modern Times*, 130-174.

¹⁶ *Ibid.*; Warren, 225.

¹⁷ Pound, *The Lawyer from Antiquity to Modern Times*, 134-135.

¹⁸ Pound, *Organization of Courts*, 26-57.

¹⁹ *Ibid.*, 250, 251.

in the celebrated Parsons case²³ lashed out against tyranny in the government and the church. Two years later the same intrepid lawyer, as a member of the House of Burgesses in Virginia, carried resolutions of bitter remonstrance against the validity of the Stamp Act, and in the face of cries of "Treason!" from fellow members he thundered against the right of the King's government to tax the colonists who had no representation in the House of Commons.²⁴ In Boston, able, honorable and wise lawyer John Adams declined to become Advocate General of Admiralty and instead accepted employment of John Hancock in the *Liberty* case where he made the notable defense that the law authorizing the tax involved was unconstitutional and void because it was contrary to the ancient laws and liberties of Englishmen, in that it was enacted without the consent of those to whom it applied.²⁵ Another impassioned New Eng-

was charged with libel for publishing information favourable to the popular cause against illegal and arbitrary acts of the Colonial Governor, William Cosby. Two grand juries had declined to indict the publisher. The Attorney General then filed an information against him and he was jailed. Two attorneys called to defend him were warned by the trial judge of the consequences of their employment, and their names were stricken from the roll of attorneys. Andrew Hamilton of Philadelphia, in his 80th year, went to New York and made a bold and spectacular defense and secured a jury verdict of acquittal. The case is one of the most notable in American colonial history. Hamilton was called to the bar in Grays Inn in 1713 and was Attorney General of Pennsylvania in 1717.]

²³ Known as the Parsons case, the action was one in which a minister, the Reverend James Maury, sued for back pay. His counsel withdrew from what appeared to him a lost cause. Patrick Henry, 27 years old, in practice but four years, took his case and burst into national prominence by his successful appeal to a jury to disregard laws of a salutary nature and uphold the natural rights of man. See William Wirt, Patrick Henry, 37-49; Moses Coit Tyler, Patrick Henry, 36-55; Robert Douthat Meade, Patrick Henry, 114-138.

²⁴ Wirt, 56-85; Tyler, 63-76; Meade, 158-182.

²⁵ Catherine Drinker Bowen, John Adams and the American Revolution, 303-342.

land lawyer, James Otis, argued, in the writs of assistance cases, that the remedies used by the King's officers were against natural equity, the fundamental principles of English law and the laws of God and nature.²⁶ Through the philippics of lawyers, the people became more keenly conscious of their fundamental rights as free-men and more unyielding and relentless against all laws and official conduct tending to subvert such rights.²⁷

2. Revolution and Independence.

The fires of revolution leaped across colonial boundaries and swept into a national blaze. And here again lawyers were in the forefront. In 1754 twenty-four delegates from seven colonies had met in Albany²⁸ to consider methods of common defense and a plan of union. Thirteen of them were lawyers. This was a prototype of future gatherings. In 1765 delegates from nine colonies, with a similar proportion of lawyers, composed a Stamp Act Congress,²⁹ which met at New York, issued a declaration of rights and petitioned the King and Parliament for a redress of grievances. In September and October, 1774, the First

²⁶ *Ibid.*, 203-225.

²⁷ Perhaps the best examples of this were Henry's address to the jury in the Parsons case, his address before the House of Burgesses concerning the Stamp Act and his Liberty or Death address before the Virginia Convention; Hamilton's address before the court and jury in the Zenger case; and Otis' arguments before the courts and juries in the Writs of Assistance cases.

²⁸ This inter-colonial conference or congress held at Albany, New York, was not connected directly with the movement which led to the Revolution, but it is notable here in that it is one of the first indications of the emerging spirit of nationalism in the colonies. Patrick Henry from Virginia attended and met there a number of lawyers from the other colonies.

²⁹ This Congress consisted of 28 delegates. It met to consider problems common to the colonies. Among the lawyers in attendance who were to become nationally prominent were John Dickinson of Pennsylvania, Caesar Rodney of Delaware, and John Rutledge of South Carolina.

Continental Congress met in Philadelphia. Forty-five delegates attended from twelve of the colonies. Twenty-four of them were lawyers.³⁰ One of them said, "Throughout the continent, government is dissolved. Where are now your boundaries? The distinctions between Virginians, Pennsylvanians, New Yorkers and New Englanders are no more. I am not a Virginian, but an American."³¹ Another declared that this Congress "first expressed the sovereign will of a free nation in America."³²

By the time a Second Continental Congress met on May 10, 1775, hostilities had begun. Committees of Correspondence, many of which included lawyers, had kept the people in each colony informed of increasing public indignation and the determined will to resist. Many people declined to follow the course of rising revolt, but it was of no avail. On March 23, 1775, Patrick Henry stood before a Virginia assembly composed of delegates, many of whom were lawyers and who were divided on the question as to whether to appease or to risk war, and boldly shouted, "There is no retreat but in submission and slavery." And, to the consternation of some of his friends, the Virginia patriot-lawyer issued the challenge of the hour in words which became the battlecry of America, "Is life so dear or peace so sweet as to be purchased at the price of chains and slavery? Forbid

it, Almighty God! I know not what course others may take, but as for me Give Me Liberty or Give Me Death!"³³ By strange coincidence, and unknown to the assembly that heard this irresistible appeal, on the previous day in the House of Commons in London lawyer-trained Edmund Burke counseled his countrymen on conciliation with the colonies in their demand for a redress of grievances. On April 19, 1775, at Lexington and at Concord, the war did begin.

At this crucial hour of colonial history the Second Continental Congress met at Philadelphia. The fate of a nation at the gates of the dawn hung before it in unsteady balance. Fifty-six delegates from the thirteen colonies soberly faced their grave responsibilities. Twenty-six of them were lawyers. After providing for a program of defense, the Congress, under the leadership of John Adams, selected George Washington, Commander-in-Chief of the Continental Army.³⁴ Adopting Henry's view of the previous year that government was dissolved, it urged each of the colonies to adopt a government, and it created a committee to prepare and submit a plan of confederation for a central government. Lawyers of distinction assisted in the drafting of state constitutions,³⁵ and lawyer John

³⁰ In this Congress many of the most active lawyers of the colonies, some of whom had never previously seen each other but who were destined to be closely connected with the future fate of the nation, served with distinction. Among them were Peyton Randolph, president of the Congress, Patrick Henry, Edmund Pendleton, Benjamin Harrison of Virginia, John Adams of Massachusetts, John Jay of New York, John Hutchinson of Pennsylvania, John Rutledge of South Carolina, the nearly a score of others.

³¹ This declaration by Patrick Henry expressed the sentiment of national purpose for which the delegates had met.

³² John Adams thus described the Non-Importation Agreement in the Congress ratified.

³³ Although Patrick Henry, the distinguished orator of the Revolution, left no manuscript of his celebrated address, of which that part here quoted was his impassioned peroration, William Wirt, Henry's first biographer, reconstructed it, in the words by which it is known, after conferring with Jefferson and others who heard it. See Wirt's Patrick Henry, Preface, and Section IV.

³⁴ Credit for the selection of Washington is largely due Adams whose courage and wisdom are attested by the fact that John Hancock, wealthy businessman and fellow townsman and client of Adams, was hopeful that he would receive the fateful commission.

³⁵ Warren, *History of the American Bar*, 39-208; Pound, *The Lawyer from Antiquity to Modern Times*, 144-174; James Bryce, *1 American Commonwealth*.

Dickinson was appointed chairman of the first committee to draft Articles of Confederation.³⁶

But the supreme achievement of the Second Continental Congress was the Declaration of Independence. A committee of five members, three of whom were lawyers, was appointed to formulate the Declaration.³⁷ Thomas Jefferson, a lawyer 33 years of age of Virginia, served as chairman of the committee and wrote the first draft, which but for some minor changes, was approved by the Congress. The Declaration boldly asserted "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed—That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government. . . ."³⁸

This was a Declaration of "self-evident" truths, of a doctrine that political power is vested in the people, of a right of a people to resort to revolution to abolish government that is irresponsible to the laws of nature and destructive of God-given rights. It was an indictment in many counts against the King of Great Britain for tyrannic usurpation of the rights "of a free people." It was a solemn declaration of United Colonies of a dissolution of all political connections with Great Britain and of

a status of Freedom and Independence. For the support of the Declaration, the members of the Congress "with a firm reliance on the Protection of Divine Providence," and "with a decent respect to the opinions of mankind" mutually pledged to each other "our Lives, our Fortunes and our Sacred Honor."³⁹

3. Constitutional Government

Revolution brought to America not only political reparation from Great Britain and national independence, but it also resulted in the acceptance of new concepts of government and a confirmation of enlarged principles of liberty. The doctrine that all political power and the right to govern is vested in the people, as set forth by Hobbes in his "The Elements of Law, Natural and Politique" and his theory of sovereignty explained in "The Leviathan"; the idea of the sovereignty of the people, and man's right to think as he desires, to worship as he pleases and to exercise freedom of speech, and the superior nature of the legislative power as explained by John Locke in his "Two Treatises of Government"; the doctrine of the separation of powers of government as propounded by Montesquieu in his "Spirit of Laws"; the theory that government should provide the greatest good for the largest number as advocated by Bentham in his "Fragment on Government"; the absolute rights of men to life, liberty and property and the obligation of government to secure these rights, and the auxiliary rights to representation in government, to limitations on the executive power, to apply to courts of justice for a redress of injuries, and to the legislative power for measures of redress when the law and the courts afforded no remedy, as explained with simplicity and with elegance of style by Blackstone in his

³⁶ U.S.C.A. Constitution, p. 13, n. 1; Sol Bloom, *Formation of the Union under the Constitution*, 533.

³⁷ The members of the committee were: Thomas Jefferson, John Adams, Robert R. Livingston, Roger Sherman and Benjamin Franklin, the first four of whom were lawyers.

³⁸ The American Declaration of Independence.

³⁹ *Ibid.*

monumental "Commentaries on the Laws of England"; all these and many more authoritative treatises on law, liberty and government, contributed by the great minds of the world, penetrated the fields of learning among the colonists.⁴⁰ The leaders of the movement for Revolution and Independence, and particularly the lawyers of the time, familiarized themselves with these most advanced ideas and sought zealously to select from them that which seemed the most practical and the most adaptable for use in America.⁴¹

When, by the Declaration of Independence, all former government was dissolved, and when the Continental Congress urged each colony to create its own government for all local needs and purposes, construction began on constitutions as frameworks for the colonies now transformed into states. In the formulation of these state constitutions, lawyers were the chief architects and draftsmen. Jefferson in Virginia and Adams in Massachusetts, and literally hundreds of lawyers throughout the colonies, set themselves steadfastly to the task of framing state constitutions through which the most advanced ideas in government could be adapted to the popular institutions serving the people locally. These constitutions served as models for other constitutions adopted by states as they were admitted to the union. This, and the length

of time they endured, evidenced the skill and sagacity of those who conceived and constructed them.⁴²

Connecticut organized its state government under its colonial charter. Rhode Island did likewise. But each of the other eleven states separately prepared and promulgated its own constitution. There were basic points of similarity among all of them. Each of them was brief and simple. Each one proceeded on the theory that all political power is vested in the people. Generally, each provided for the three conventional departments of government. In each of them were provisions vesting the broadest political power in the legislative department. Under each of them a legislative body was provided for, which in most instances was bicameral. Each of them, either expressly or by implication, adopted the doctrine of the separation of powers, the most classic expression of which was, "In the government of this commonwealth the executive department shall not exercise the powers of the legislative or judicial, or either of them; the legislative shall not exercise the powers of the executive or judicial, or either of them; the judicial shall not exercise the powers of the executive or legislative, or either of them—to the end it may be a government of laws and not of men."⁴³ Some of them contained provisions similar to those set forth in the Bill of Rights. Like Magna Carta, these new colonial constitutions contained little that was new. They confirmed what the colonists understood from experience were basic, unalien-

⁴⁰ The rise of the democratic movement in western Europe, the evolution of the concept of liberty and the advancement of thinking in the fields of political philosophy and government, all precipitated by the growing sentiment against feudalism and the abuses practiced by monarchical government and by the English Revolution of 1688, gave popularity to the works of Locke, Hobbes, Bentham, Montesquieu and Blackstone among the educated people both in Europe and in the American colonies.

⁴¹ Pound, *The Lawyer from Antiquity to Modern Times*, 144-174. See also biographies of leading lawyers of the time who assisted in drafting state constitutions.

⁴² The colonies adopted constitutions as follows: New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina in 1776; New York and Georgia in 1777; Massachusetts in 1780; New Hampshire in 1784. Connecticut operated under her colonial charter until 1818, and New Hampshire did likewise until 1843. See Pound, *Organization of Courts*, 92-102.

⁴³ The Constitution of Massachusetts, 1780.

able rights, and they provided for the continuation of institutions of self-government under which they had lived for many generations in America. They were legal documents prepared with the assistance of men of the law to express the popular will.

To frame and secure the adoption of a constitution for a national government was a far greater problem. There had been no national government prior to the Revolution. There was no legal system or judicial structure operating on a national basis. National crises had demonstrated the necessity for co-ordinated effort, but attempts at inter-colonial government had not advanced beyond conferences participated in by representatives from the different colonies. Proceeding on the theory advanced by Locke that the legislative power is supreme over all powers of government, and responding to the "felt necessities" of the time, the First Continental Congress called a Second Congress, that there should be continuity in the exercise of governmental power. The Second Continental Congress, in the exercise of the legislative power vested in it as representative of the people, not only threw off all bonds of allegiance with Great Britain, declared the colonies free and independent states, and promoted the formation of local government under state constitutions, but it also directed that Articles of Confederation for national government be devised that the Congress might thereby become a constitutional instrumentality of that government. The draft of the Articles, prepared largely by John Dickinson, was modified by amendment and adopted by the Congress on November 15, 1777. This draft was submitted to the states for ratification, and on March 1, 1781, it was ratified by the last of the thirteen states.

The Second Continental Congress, by the constitutional process used in the Articles,

extended the powers of government by the adoption of what is known as the Ordinance of 1787 for the government of the Northwest Territory, that is, the territory lying northwest of the Ohio River. This great document was largely the handiwork of Jefferson, although he was not in attendance at the Congress when it was passed and his draft was not the one that was finally adopted.⁴⁴ The immediate purpose of the Ordinance was to provide a plan for territorial government, but it also reconfirmed ancient principles of liberty contained in prior documents of a constitutional nature, and it set forth, at the hands of the lawyers who prepared it, the basic concepts of rights and liberties which it is the function of government to protect, for the consideration and use of the men who were at the hour of its adoption locked in solemn debate over a constitution for the government of the United States.⁴⁵

The convention which drafted the Constitution of the United States at Philadelphia in 1787 was perhaps the most memorable and the most venerated by Americans of any gathering of men for any purpose on the North American continent. It met at one of the most critical hours of American history. The state of the new nation was desperate. Economic disaster was ominous. Jealousy and suspicion between communities, states and sections were dissipating national cohesion. Patriotic fervor which

⁴⁴ Nathan Dane, able lawyer of Beverly, Massachusetts, and later (1823) author of "Abridgement of American Law," as chairman of a committee for the purpose, prepared the final draft. This Ordinance is frequently considered with the Declaration of Independence, the Articles of Confederation and the Constitution as the chief landmarks in the progress of liberty and constitutional government in the United States of America.

⁴⁵ The Ordinance of 1787 for the Northwest Territorial Government was adopted by the Congress on July 13, 1787. The Constitutional Convention of 1787 was in session in Philadelphia from May 25, 1787, until September 17, 1787.

had sustained the Revolution was subsiding. Faith in government under the Articles of Confederation was vanishing. The power of Congress was waning. Its members were taking leave. There were but 18 delegates from eight states present when the Ordinance of 1787 was adopted. Commissioners from Maryland and Virginia conferred at Alexandria on urgent problems of trade with which Congress could deal only with languor. Delegates from five states held a convention at Annapolis to consider the grave state of the nation. Alexander Hamilton, New York lawyer, proposed that a convention be held to "strengthen the General Government." Out of the proposal arose a faint hope. On February 21, 1787, the Congress passed a resolution calling for a convention of delegates from the thirteen states to meet in Philadelphia the second Monday in May "for the sole and express purpose of revising the Articles of Confederation." Twelve of the states selected their delegates. Rhode Island declined to elect delegates or participate in the Convention.

On the day set for the meeting delegates from a majority of the states had not arrived in Philadelphia. A rainy season, swollen streams, impassable roads had delayed them. The Commanding General of the Revolution, despite urgent business and financial responsibilities at home and the discomforts from rheumatism, had ridden on horseback alone along trying roads, with his arm in a sling, in time to arrive with his usual military and business punctuality. Venerable, illustrious and beloved Franklin, notwithstanding his fourscore years, was on hand graciously to welcome and encourage his fellow delegates. It was May 25th before a quorum had gathered. On that day organization was perfected and Washington was unanimously elected President of the Convention. Sixty-five delegates had been

selected by the different states. Only 55 attended. Of these, one had attended the Albany Congress, three the Stamp Act Congress and seven the First Continental Congress. Altogether, 43 had at some time attended Congress, and 18 were members of Congress at the time. Nine had signed the Declaration of Independence. Ranging in age from Franklin, the eldest, who was 81, to Dayton, the youngest, who was 26, the majority of them were under 40. Among them were men who had become already or who were destined thereafter to become the most prominent men in America.

Of the 55 delegates who attended the Convention, 34 were lawyers. A small number of them, like Madison, had been educated for the law but had not practiced. Some of them had received their legal education in England and had been admitted at the Inns of Court. Some had already distinguished themselves by professional achievements and in public service; and many of them thereafter became prominent in high judicial service, in other public offices and as leaders of the profession. Among them was George Wythe, the law teacher at William and Mary College, who was one of the signers of the Declaration of Independence and who had the distinction of serving as instructor of Jefferson, Marshall, Madison and Monroe. Although many of the lawyers who had led in the movement for Independence, including Jefferson, Adams and Henry, were not members of the historic Convention, there were others of high renown who were not only leading lawyers, but also students of political philosophy and the science of government and skilled in politics and statecraft. Among these 34 lawyers of the Convention were Alexander Hamilton of New York; Rufus King and Elbridge Gerry of Massachusetts; Edmund Randolph and James

Madison of Virginia; William Samuel Johnson, Oliver Ellsworth and Roger Sherman of Connecticut; William Livingston and William Paterson of New Jersey; Jared Ingersoll, James Wilson and Gouverneur Morris of Pennsylvania; George Read and John Dickinson of Delaware; John Rutledge, Charles Pinckney and Charles Cotesworth Pinckney of South Carolina; Luther Martin of Maryland; and Abraham Baldwin of Georgia.

With a boldness of spirit and resolution, like unto that by which the Continental Congress declared national independence, the Convention set to work to draft a Federal Constitution providing for the establishment of a new national government. Five days after permanent organization was completed, the delegates of the Convention resolved "that a national government ought to be established consisting of a supreme legislative, executive and judiciary."⁴⁶

With daring audacity they crossed the Rubicon limiting their authority to that of revising the Articles of Confederation and, disregarding any allegiance by which they may have been bound to maintain the government which was responsible for calling them into convention, they proceeded to lay the foundations for a new, more effective and more durable federable government. It was a momentous decision. Some of the delegates declined to support the action and left the Convention.⁴⁷ But others with superb tenacity adhered steadfastly to the paramount purpose. For creating a government of three departments Randolph of Virginia introduced for the consideration of the Convention what was known as the Vir-

ginia Plan. Charles Pinckney introduced the South Carolina Plan; William Samuel Johnson, the Connecticut Plan; William Paterson, the New Jersey Plan. Delegates from different states had widely divergent views about the various concepts in the plans. Delegates from small states feared that the national government would encroach on their liberties. Delegates from the large states feared that the national government would encroach on their rights of property. Representation in the legislative department was an insuperable problem. The rights of the legislative department to appropriate money, control commerce and hold in check the executive department each had ardent champions. The nature and powers of the executive department, the selection and jurisdiction of the judiciary, the election and operation of the legislative bodies, and the means for balancing the powers to be exercised by each presented issues highly controversial and dangerously explosive.

Prolonged and bitter debate ensued. Unable to obtain support for their views, additional delegates left the Convention.⁴⁸ But a majority of them cleaved resolutely to the task. Correlation of the major parts of the multiple plans was attempted. Efficacy of the technique of conference and compromise was discovered. Delegates from small states, such as Dickinson and Paterson, found a common meeting ground with delegates from large states, like Franklin and Madison. Proportional representation in one house of the legislative department was acceptable to the delegates from the large states when coupled with equality of repre-

⁴⁶ 5 Elliott's Debates on the Constitution, 134.

⁴⁷ Among them was Luther Martin of Maryland, who had served as Attorney General of his state and was, for a generation, one of the leading lawyers of the country and was later called by Jefferson "the Federal Bulldog".

⁴⁸ Among these was Alexander Hamilton, brilliant lawyer of New York, who, despite the failure of the Convention to accept his proposals, kept in touch with the Convention during his absence from its sessions, returned to sign the Constitution when it was completed and became one of its most ingenious and celebrated champions.

sentation in the other house, which satisfied the delegates from the small states. One by one the differences were resolved. A system of checks and balances evolved. A committee on detail prepared a final draft. Gouverneur Morris of Pennsylvania supplied the final arrangement of the material and the finished style. Finally, after 100 working days had elapsed, the engrossed document was laid before the Convention on Monday, September 17th, 1787. Forty-two delegates attended this the final session of the Convention. Thirty-nine of them signed the Constitution.⁴⁸ The Convention adjourned. Its handiwork was cast on the waves of destiny.⁴⁹

Concurrently with the approval of the Constitution, the Convention adopted a resolution that the Constitution be laid before Congress and then submitted to a convention of delegates chosen in each state by the people under the recommendation of its legislature, for their assent and ratification, and that when nine of the thirteen states had ratified the Constitution the Congress proceed to call an election and fix a time and place when the President and the Con-

⁴⁸ The three who did not sign were Randolph and Mason of Virginia and Gerry of Massachusetts.

⁴⁹ There are no complete official reports of the proceedings of the Convention, for the sessions were not open to the public and the Convention had no official reporter. Madison made extensive notes of the discussions, and these are contained in Jonathan Elliott's "Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787," in 5 volumes (1896), usually referred to as Elliott's Debates. See also Max Farrand, *Records of Federal Convention of 1787* (1911), 3 volumes. For comments on the Convention, its delegates and its work there is a multitude of authorities, only a few of which are: Joseph Story, "Commentaries on the Constitution of the United States," 2 vols.; Charles A. Beard, *American Government and Politics* (1912); Charles A. Beard and Mary R. Beard, *The Rise of American Civilization* (1930), 2 vols.; James Bryce, *American Commonwealth*, Vol. 1 (1888); U.S.C.A.

gress elected should meet to execute the Constitution. A letter from General Washington, as President of the Convention and written by order of the Convention, was sent with the Constitution and the resolution of the Convention to the Congress, which on September 28th, 1787, passed unanimously a resolution that they be transmitted to the several legislatures in order that they be submitted to a convention of delegates chosen by the people, as provided by the Constitution. As has been frequently observed, the proceeding was revolutionary. As a result of it one government was substituted for another, and the new Constitution, in effect, abrogated the existing Articles and became the fundamental law.

Two developments of supreme importance occurred during ratification. The one had to do with a transcendent analysis of the Constitution and a deeper understanding of the science of government. The other involved an enlargement of constitutional sanctions for ancient, undisputed, personal liberties. Lawyers were leaders in both developments. Immediately after it became known that the Convention had framed a new federal Constitution, the floodgates of opposition were thrown wide. Scathing and relentless attacks were made upon it. But for the skilled and courageous leadership on the part of illustrious and sagacious lawyers in disseminating among the studious, the enlightened and the cultured of the new nation illuminating information about the paramount merits of the Constitution, the struggle for ratification may have failed. Among the lawyers who furnished that leadership were Alexander Hamilton, who was to become the brilliant Secretary of the Treasury of the first government under the Constitution; James Madison, known as the Father of the Constitution, who was to become Secretary of State under President

Jefferson and later President of the United States; and John Jay, who was to become the first Chief Justice of the United States.

From October 27, 1787, until April 7, 1788, these three champions of the cause of the Constitution contributed to a semi-weekly New York newspaper, and other newspapers of the time, a series of articles in which they discussed with brilliant and penetrating analysis and with trenchant and incisive reasoning the essence, the purposes and the operation of representative government, the political and economic philosophy of the proposed Constitution and the advantages to be derived from a union of the states under a federal government provided for by the Constitution. The articles were reprinted in other newspapers and journals. A total of 77 appeared, following which eight additional articles were produced by the same authors. The entire series of 85 was collected and published as a book, entitled "The Federalist".⁵¹ The book was widely circulated.

The immediate aim of the celebrated authors of the Federalist papers in writing these renowned articles was to answer in the forum of public opinion the arguments against the Constitution. But by their contribution of these papers they performed a far more important and enduring purpose. With amazing swiftness they produced a profound commentary and a masterly treatise on the whole subject of constitutional government. They combined the results of prodigious research with consummate skill in reasoning in tracing the rise of government based on constitutions and legal codes from ancient, and to some extent legendary, origins under Minos of Crete, Zaleucus of

the Locrians and Lycurgus of Sparta, through the emergence of democratic impulses and the exigencies of unions of states under Theseus of Attica, Draco, Solon and Pericles of Athens and Achaeus of the Achaeian League to the constitutional experience of their time. Through the Ecclesia of Athens, the democratic assemblies of the Greek city-states, the Ephori of Sparta, the Tribunes of Rome and the Commons of England they traced the irresistible power of the popular will upon institutions of government to a consummation of the concept that power to govern is vested in the people as confirmed by the opening words of the American Constitution, "We the people of the United States." They reproduced the testimony of Plutarch, Polybius, Montesquieu, Blackstone and other political and legal philosophers and wise men of history in support of the eternal soundness of that concept. The dangers to liberty arising out of usurpations and abuses of political power under different forms of government were considered, and the principle and efficacy of representative government were discussed along with "the turbulence and follies of democracy." The entire Constitution in terms of its broadest concepts, as well as its minutest provisions, was examined, not alone by the results of the experience of other nations, but also, and particularly, by the experience in government in America. Americans could not read the Federalist without feeling a sober consciousness that a fateful hour had struck in the annals of civil history, and that the American people were in a rendezvous with destiny to determine for all time whether "societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force."⁵² Through their pro-

⁵¹ There are numerous editions of The Federalist. Although much of its contents had to do with the political and economic conditions of the time when it was written, it is still widely used both in cultured circles and among those who are in public service.

⁵² Hamilton, The Federalist, No. 1,

duction of the Federalist, Hamilton, Madison and Jay were unalterably confirmed in their faith in the future of constitutional government in the United States, and with deep convictions in that faith they not only successfully led the crusade for ratification in those states where opposition was well nigh impregnable, but they also gave them-

selves unreservedly to the establishment of the government on the high plane of excellence envisioned in the Federalist. The Federalist not only gave its authors added prominence in the higher areas of statesmanship, but it also profoundly influenced the course of constitutional government in America.⁵³

⁵³ In the historic decision of the Supreme Court of the United States in *Cohens v. Virginia*, 6 Wheat. 264, 418, Chief Justice Marshall said of The Federalist and its authors:

"The opinion of the Federalist has always been considered as of great authority. It is a complete commentary on our constitution; and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitled it to this high rank;

and the part two of its authors performed in framing the constitution put it very much in their power to explain the views which it was framed. These essays having been published while the constitution was before the nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of state sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it..."

(To be concluded in the next issue.)

"Good laws lead to the making of better ones! bad ones bring about worse. As soon as any man says of the affairs of the state, 'What does it matter to me?' The state may be given up for lost."

Society, Crime and the Criminal

By

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Man, who is a social being, finds his life and its goals satisfied in Society. In the harmonious adjustment of the relation between society and the individual lies the good both of society and the individual. The individual is like a thread in the net of society, and in the strength of the threads is the strength of the net; so also in the solidarity of society is the strength of its individual members.

Conflict between the individual and the society of which he is a member, is a potent cause of crime. The individual is expected to respect the laws of his State, but at the same time it should be remembered that the State should not be an arbitrary dictator. In days of democracy, the State has its duties as much to the individual as the individual has to the State. The psychology of the law lies in that it is based on the public will, and the sociology of the law underlines the great truth that law is not an instrument of oppression or depression, constituting chaos, but an instrument of social service meant for the greatest good of the largest number in society. As Leon Duguit has pointed out, in his "Law in the Modern State", the State should not merely look to and be satisfied with its mere notions of external and internal sovereignty, but should look to social service and carry out the concept of a social welfare State.

Where the laws bespeak of reason and are based on the wishes of the people, they

will be respected and the people will cherish them as the laws of their desires and making and meant for the general good of the community. Such healthy laws will prevent and obviate conflicts between the State and its citizens or subjects. But laws which are unreasonable, laws which savour of oppression, laws which promote class warfare, will breed contempt and would result in conflict between the State and the people. Conflict may result in what is known as 'crime'. If the conflict is inspired by the pure conscience of some holy individual, it would lead to a pseudo crime, for sociology or ideal ethics would not regard a pious act as a crime. The pseudo criminal, or rather the offender, would really go as a martyr. A great example of such lofty conflict is that of Socrates, as witnessed at the trial. And as Saint Thomas Aquinas has said, "In the court of conscience there is no obligation to obey an unjust law".

Sometimes, however, even where the laws are quite good and reasonable, some individuals come into conflict with these laws. This is because such individuals are anti-social. They are anti-social because of maladjustment or non-adjustment of their personality traits. Psychological re-education is the remedy in such cases. But as prevention is better than cure, good social education at the very start and during the period of the development of the mind should be utilised. Knowledge and practice of genetics should be spread far and wide. And above all, parents should be taught the science and the art of educating their children and of decent living. There is nothing more valuable than the harmonising

influence of socialising education. The child and the youth must be taught that life is meant more for giving than for taking, and that the individual ego and good should be subjugated to the ego and good of society. The child and the youth should be brought up in a healthy environment and should be trained in the formation of good habits, for our habits form our temperament and build our personality. For the development of healthy habits which help to create a good personality with well organised emotions, it should be realised that good home education is even more important than good school education. Children, the adolescent, and adults, all should be taught to work in harmonious groups *with a team spirit*. At home, parents should be *impartial to all* their children *alike*. Impartiality would avoid jealousy and conflict right from an early age, when the personality is being developed. Schools and colleges should also foster harmonious team life. Every youth should be led to realise that life is meant for good living, not merely for selfish good, but for the good of our fellow-beings also. The values of truth, love and beauty should be embedded in the bosoms of all young people, and that can be done not merely by lectures in class rooms *but by training in good and worthy habits*. for our habits form our nature.

We may cite with Edwin Markham—

"The crest and crowning of all good,—
Life's final Star, is Brotherhood."

And to quote Hezekiah Butterworth—

"One taper lights a thousand,
Yet shines as it has shone;
And the humblest light may kindle
A brighter than its own."

Turning next to the actual concept of 'crime', we may say that a crime is an act or omission, sinful or sinless, which a State or a Society has, by its laws for the time

being in force, thought fit to punish or otherwise deal with, as an aggrievement of that State or Society. This definition of crime brings out its essentials, namely, (1) an act forbidden by the law, or an omission to do what is required by the law, in either case whether sinful or sinless (thus delineating that law and morality or crime and sin are not necessarily identical), (2) variance according to place (notions of positive morality of the community), (3) change with changing times, for laws are not static but dynamic, and the notions of morality, sinfulness and criminality change with the changing needs of time and the onward march of progress, and (4) liability to punishment, though punishment need not necessarily follow (for the offender may be placed on probation).

An act or default may, in the eye of the law, be regarded as a 'crime', though sociologically and ethically it may be a harmless act or default. On the other hand, an act or default may be sociologically or ethically, an undesirable, sinful or even heinous act or default, and yet it may not be regarded as a crime, in so far as the positive morality of the people in that country may not have considered it as necessary for prohibition. So criminality or non-criminality is a matter of public opinion, and is a reflection of the civilization of the nation—the culture of the community concerned.

We shall turn now to an understanding of the 'criminal'. In the eye of the law, any person who is seven years of age, or of such age as by the law of the country concerned is deemed to be an age of sufficiently mature understanding (as to the difference between natural right and wrong), is capable of committing a crime; and if he commits a crime, he is termed a 'criminal' except in cases of insanity of the legal type (i.e. such loss of understanding as the law

recognises as 'insanity').* Sociologically or morally, a person is not necessarily a criminal by reason of his having violated some unjust rule of law. The law may condemn the person concerned and stigmatise him as a criminal or offender; but he may win his martyr-dom.

There are different types of criminals. We have, for example, the atavistic, the quasi-atavistic and the pathological types.

About 1876, Lombroso, an Italian physician and philanthropist, examined the skull of one Vilella, a brigand, and from such examination he got his theory of '*the delinquent type*'. The atavistic and pathological origins, propounded by Dr. Lombroso, mark his fundamental contribution to the science of crime, *turning the attention of society from the bare aspect of crime to the fruitful aspect of the study of the criminal*. Professor Ferri propounded his theory of factors, stating that crime is caused by anthropological, individual, cosmic or physical or social factors, and that the bio-sociological variety of the criminal is determined by the dominating influence of some particular factor. His "*New Horizons of Criminal Law and Penal Procedure*", published in 1884, laid the foundation of the *theory of Determinism*. Raffaele Garofalo introduced his doctrine of *natural and artificial crimes*. According to him 'criminality' is "the result of moral anomaly due to ethical degeneration through retrogressive selection".

According to the Lombroso School, criminal characteristics have "dark hair, sometimes woolly in texture; a skull which may vary in five directions; (a) it may be round like a dome, or (b) depressed like a roof

that is flat or low, or (c) its vault may be keel-shaped, or (d) it may be bulging, with protuberance on one side, or both sides, or in front, or behind, or (e) it may have a sugar-loaf appearance; eyebrows that are heady or scanty; a nose that is defective and is frequently without a bony skeleton; ears that are long and thick; skin that is pale and wrinkled; lips that are cleft; teeth with the molars undeveloped, wisdom teeth absent, the canine teeth over-developed, etc."

There were criminal types in *Samudrikalakshanam* also, by which the character of a person could be found by an examination of factors, such as height, weight, voice, complexion, blood, oily secretions from certain parts of the body. Varahamisra in *Brahatsamhita* explains that. A person with feet having a yellowed colour, sunken knee and a nose like an incised one and "with brows bent in the middle, with broken lines on the forehead" was liable to be held guilty of some sexual offence. And a man with the navel turning from right to left or with the face rectangular, was liable to be pronounced a fraudulent person. A person with a deep forehead ran the risk of imprisonment. And a woman whose little toe could not touch the ground and whose eyes were wild, with dimples in the cheek whenever she smiled, was liable to be pronounced a potential adulteress.*

As against the theory of the 'criminal type', we have the conclusions of Dr. Charles Goring. His work embraces a study and analysis not only of the physical and mental characteristics of the prisoners examined by him, but also the data relating to the formulation of theories on the question of the relative influences of heredity and environment. Dr. Goring reached a different con-

* Insanity does not include mere mental disease or disorder falling short of deprivation of understanding. See: Sethna, M. J. : *Society and the Criminal*, p. 66; and Sethna, M. J. : *Jurisprudence*, 1959 edn. pp 371, 372; see particularly page 372 for a *compromise between medical and legal views on insanity*.

* Pillai, K. S. : *Principles of Criminology*, pp. 96, 97.

clusion from that arrived at by Dr. Lombroso. According to Dr. Goring, criminals, like individuals, do not possess any characteristics, physical or mental, which are not shared by the non-criminal type of the population. The difference is only that of degree. He, however, found that criminals showed a decadence in intelligence similar to their increasing physical defectiveness. They come from the feeble-minded and the feeble-bodied. Dr. Goring could not find any evidence of "the born criminal" found by Dr. Lombroso.

Our conclusion, in this respect, should be that though there is no such person as the 'born criminal', yet the criminal is generally a person *susceptible to crime because of his feeble-mindedness, physical defect, mental fault or anomaly*. There are certain persons who are *potentially* criminal. Due to weakness of body and mind, due to lack of character, a person may, in a tempting environment, be susceptible to crime, though in the absence of such an unhealthy environment no crime may be committed. The person concerned is *potentially*, but not essentially, criminal. His criminality lies harmless, for the time being, like gunpowder lying harmless in a cellar. But just as an explosion occurs when a lighted match is applied to such gunpowder, so also when a tempting environment overcomes a feeble-minded person (a potential criminal as he may be) the catastrophe of crime may be caused. Even strong and healthy persons, without any anomalies, often get influenced by bad company or in an unhealthy environment which is often so productive of crime.

As prevention is better than cure, we should look not merely to prison reform and after cure, *but more appropriately to psychological education and the building of character by training in good habits and the practice of virtue right from childhood*. Parents should produce a healthy home en-

vironment, and school teachers should pay good attention to the formation of character in those under their care and guidance. A healthy link between the school and the home is desirable and even essential. No pains should be spared in adjusting the personality traits of the young ones. The production of well adjusted personalities will result in the minimisation of susceptibility to crime.

As important as education and balancing of personality traits, is the breeding of a healthy race, *for the innates are as effective as the environmentals*. If the innate qualities of a human being are sound enough, there will be a far lesser susceptibility to crime even in a tempting or vicious environment. So the study and practice of genetics are absolutely necessary. A healthy race means healthy behaviour. The fundamental truths of genetics should be disseminated through sixteen mm. films. Our State Governments should have such films (giving knowledge in the practice of genetics) prepared and shown freely far and wide. Such films should be prepared *under the guidance of scientists and experts in the science called 'genetics'*. There can be nothing nobler than the building of a healthy and noble race. If the people themselves are good and noble, there will be a great minimisation of crime and delinquency.

Juvenile delinquency should be cured at the earliest, through proper care and treatment of the juvenile in a proper environment of properly kept and psychologically-equipped children's homes.

In fine, genetics and psychological education would work wonders in the prevention and treatment of delinquency, and in the having of a virtuous society. Where law cannot, by itself, help, law, in the light of other values, such as those of education, culture, music, environment, will help.

Social Legislation with Reference to India

By

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SOCIAL LEGISLATION—ITS MEANING AND SCOPE:

Legislation usually means law-making by the state; but laws are sometimes found to be or have been made by some other agencies or instruments as well. In India, specially, in ancient as well as mediaeval ages, the society itself used to make and formulate laws for its own governance and its various aspects. Again the term society also may be used in two senses—wide and narrow. In its wide sense, society means the entire organisation of the human association of the country or the state as we find in the expressions like 'Law and Society', 'Social Sciences', 'Social Welfare State' etc. while in its narrow sense, it means the organisations and institutions regulated by the rules devised and administered by the organisations themselves as contrasted with the legal rules enacted by the state. According to this narrow conception of the term society, social laws mean and include only those provisions which regulate the mutual relationship of the members in the organisations mainly on the principles of caste, religion, occupation, status etc. in all matters both religious and secular. Thus according to the narrow interpretation of the term society, among the Hindus there are certain rules, customs and practices which have to be followed and observed by them on pain of social punishments in the form of *prayascitta* or excommunication. In this sense, we

may have the society of the Hindus, the society of the Muslims, the society of the Brahmins, the society of the weavers, the society of the untouchables and so forth.

Thus legislation may be either by the state or by the society. Originally, in ancient India, legislation was mainly by the society for the society both in its narrow and wide conceptions. But in modern India, society no longer possesses any power for legislation to be recognised by the state. Society now only insists on some dwindling authority, on the observance of certain practices and performances that were originally ordained by it. Now-a-days, legislation is primarily by the state. In this state-legislation, again, there are two sub-categories. State-legislation may be for some 'social reform' which will imply the society in its narrow sense. Again some legislation may be for the whole society or the state without any special reference to any consideration of any narrow group or community. The entire society or the state is now primarily interested in and prompted by socio-economic considerations aiming at socio-economic equality and justice. Thus we have to combat unemployment; we have to provide for the relief to the old, the orphans and the destitutes; we have to think in terms of giving medicine to every patient, food to every mouth and education to every child; we have to take legislative measures to remove beggary, prostitution and illiteracy;

we have to take steps for land-reforms, judicial reforms and introduce legislation so that we may gulf the difference between the capital and the labour, the employer and the employee and the different employees of the self-same institution or organisation; and all these we have to keep in view in the context of the new social objective for the new social revolution leading towards the realisation of the society of the socialistic pattern.

The very conception and constitution of the society also have got to be changed. There will no longer be any society of the old or the orthodox type; we shall have new societies organised on regional basis on the analogy of municipalities, unions or panchayats. There will be virtually urbanisation of villages and the dispersal in the congestion of the present town life. The general legislation for the whole of the society, country or the state will be by the state. But some detailed bye-laws may be framed and administered by the regional social units. Their main duties will be to look after local sanitation, local communication, arrangement of primary education, establishment of local hospitals and poor relief centres, organisation of cultural units, national games and sports, provision for moral and social education and administration of civil and criminal justice in small matters by instruments and agents devised and elected by themselves on universal adult franchise. This was also the dream of "village-swaraj" as dreamt, by the father of the nation. Social education should be imparted, social service should be fostered and social consciousness should be inculcated. This will mean to have societies within a society. New legislative powers within limited degrees can be bestowed upon these new social units. They will never bother about meaningless religious ceremonies, blind superstitious be-

liefs and adherence to orthodox conservatism. On the contrary, they will insist on a high sense of civic and social responsibility, so that the members thereof can be thoroughly trained within their small spheres to be useful citizens to serve the country and the state at large when the opportunities will present themselves.

SOCIAL LEGISLATION IN ANCIENT INDIA

So far as ancient India was concerned, the entire legislation was by the society and for the society. The legislators also were not the kings but the sages who were the leaders and philosophers for the people. Thus it was the social leaders and philosophers who gave the ancient law as we find in the Dharmasutras, the Dharmasastras, the Arthashastra of Kautilya and the different Nibandhas and Commentaries of later epochs. The status of the king was regarded as subordinate to and included in the society of the period. It was mainly for this reason that the legislation by the state in the modern sense of the term is not to be found in the ancient Indian literature. There was, of course, the king; but he himself was subject to the 'rule of law', as formulated and enunciated by the social philosophers and the sages of the time. The king also was not entitled to make any law himself. He was simply to execute the law and apply it in deciding disputes for which he had both original and appellate jurisdiction.

The ancient sages of India not only made new laws but also they made provisions for repealing certain existing laws and practices. This can be very objectively seen from the treatment of what is known as 'Kalivarjya' which implies and includes practices and customs not to be observed or followed in the Kali age. In other words, according to the doctrine of 'Kalivarjya', certain laws are to be treated as repealed for the Kali age. Reference may also be made in this

connection to "lokavidvasta" and "apad-dharma" which have got some legislative elements in them.

SUBSEQUENT TRENDS:

In course of time, however, what with the natural course of evolution and what with the influence of some extraneous factors that came in the way of the Indian society—specially during the Muslim and the British administration—the present Indian society had assumed a shape which is very greatly different from that of its more ancient Prototype. The fundamental change in the very structure of the Indian society must be responsible to give an altogether different colour to the problems of modern social legislation in India. With radical and fundamental changes in the Indian society on account of its impact with Western education and Western civilisation, brought in the train of British administration, the original construction of the society and its method and quantum of legislation too readily appeared to be inadequate. The reasons were primarily political. On account of the domination by an alien government, no due attention was paid to the political and economic rights and aspirations of the people. The reasons of this colossal indifference were obvious. The alien rulers were avoiding political rights and planned economic programmes for the all-round prosperity and advancement of the society. Thus of the socio-politico-economic aspects of the society, only the first element drew some innocent attention of the government of the day. It is for this reason that we find that here and there, at irregular intervals some 'social reforms' or social legislation undertaken. Here, clearly the term society has been used in a narrow sense. This so-called social legislation necessarily gave very narrow conception to the meaning of the term society. In other words,

society then was not to be understood in its widest and most comprehensive sense embracing all aspects and factors of human rights and aspirations. Political rights were thus tabooed; economic rights were not to be encouraged. It was in this way that really grew the narrow conception of the term society. Society in this narrow sense obviously means the institutions and practices based on religion, customs, occupation, caste and so forth. But to think of social legislation in India at present, we must use the word in its most comprehensive sense including all conceivable aspects of the society—political, economic, cultural and ideological.

With the attainment of independence and the inauguration of the constitution of India, the political rights and guarantees have been safeguarded. What is left now is the attainment of what may be termed as socio-economic justice and equality. The scheme of social legislation also must be conceived to benefit the society at large and advance it to more completeness and greater and greater prosperity bearing always in mind the cultural context of the ancient Indian society ultimately to achieve the socialistic pattern. Obviously, the only alternative left before the country to-day is to accelerate the process of legislation in such a way that it may lead to the realisation of that noble mission and the fulfilment of that human destiny so as to attain all that is feasible by offering opportunities to every individual, independent of the question of religion, sex, caste or conviction, to maximise his efforts, so that he may be in a position to attain the highest of which he is capable. For this purpose, we may have to begin with social legislation in the narrow sense, to approximate as rapidly as possible, the widest sense of social legislation in India in the present context—domestic and international.

SOCIAL LEGISLATION IN THE PRESENT
CONTEXT:

During the present century there have been many fundamental structural changes in the British society—which have been followed by corresponding changes in the law of the land. The social welfare state and the technique of planning have developed considerably. The most important legal transformations can be visibly noticeable in more or less in all the important notions of law—both public and private. Thus in England, the society changed and the corresponding changes in the law were brought about gradually. But a different phenomenon could be noticeable in USSR where the Soviet leaders had at first visualised in theory and subsequently utilised in practice the necessary formulae and institutions of the law to mould a new society. Thus there was a great difference in the social legislation in England and USSR. It may perhaps be a correct generalisation to say that where the social phenomenon changes gradually and imperceptibly, legislation also may fairly be expected to keep pace with the changes in the society as far as feasible. But where some drastic change has to be made, the legislature has to play a much stronger and a much more definite part. In other words fundamental social changes cannot be brought about except through legislation—positive and teleological.

If we look at the evolution of the Indian society, we can easily find that everything was done and everybody lived for the society—its welfare and improvement. The welfare conception of the society or state which was appreciated for the first time in the West only in the beginning of the present century was practically organised by the Indian thinkers at the very threshold of the organisation of the human society—as to be found revealed in the scriptural litera-

ture of India. We clearly find therein that the life of everyone including that of the king implied a bundle more of duties than of rights. Everyone was to do something for the society—not only of men but also of beasts, birds and plants. Hence there arose a very wide and genuine conception of charity in India from the very beginning. It was thus no wonder that in India, the society grew out more of sacrifice than of self-indulgence in luxury. This also very greatly helped the economic adjustment and redistribution. The Indian joint family system which was the miniature form of the society was based essentially on this wide liberality and deep sympathy.

Thus the teaching of the Indian society has invariably been self-abnegation for others. This is what is the exact spiritual achievement of the Indian culture and society. Lord Buddha, emperor Ashoka, and Mahatma Gandhi—to mention only a few—were not mere accidents in the Indian culture. They were the natural consequents of which the Indian culture was the antecedent. Emperor Ashoka conceived and administered a welfare state even several centuries before the birth of Christ. It is thus no wonder that Ashoka with his social welfare conceptions, achievements and performances has greatly inspired the model of the Indian leaders for remoulding the present Indian society as a socialistic welfare one. Ashoka was great not so much as a warrior or a politician but his real greatness was that he could gain the hearts of his subjects by love and charity. He established hospitals and other charitable institutions not only for men but also for beasts and birds. Many kings could be named after Ashoka, such as, Kaniska and Harshavardhan, who would, at intervals, empty the entire royal treasury for the people of the country and they would choose to put on rags. What could be more conducive to and indicative

of the welfare state of which we hear and talk so much to-day? We talk of welfare state as contrasted with police state which was the ideal in vogue in the West even up to the last century. The administration—legal or otherwise—in ancient India was based on this social welfare.

After her independence, India now advocates this rich heritage of her culture for the whole world. In other words, India is now most earnestly striving for not only an Indian welfare state but also a "world welfare" state in which all nations and individuals will live as members of the self-same family, fraternised by love, peace, tolerance and co-existence as implied by the discipline of "Pancha Shila."

SOCIAL LAW COMMISSION:

No piecemeal legislation is adequate when some outstanding epochs have taken place in the country's constitution and government envisaging a welfare state and the enjoinder of the Congress to secure a socialist pattern of the society. A corresponding change also in the socio-legal system of the country in all its aspects has become a desideratum. A Social Law Commission is the only instrument by means of which the reorientation of the entire socio-legal system of India is feasible. Social legislation in India to-day should mean and include "social welfare" legislation and it should be phased, concerted, progressive and comprehensive.

"Reason is the life of the law: any, the common law itself is nothing else but reason.....the law, which is perfection of reason."

Role of Law-Teachers

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The discerning hospitality of the University Law College, Calcutta, has urged me on to a *few notes*. The great Prime-Minister of India, though a Barrister-at-Law, has no kind words of *the lawyers*. If any profession has come in for adverse criticism, it is the profession of law.

In the Uttarpradesh where I served the Allahabad University, for nineteen years, many students pronounce "*lawyer*" by the phonetic equivalent of "*liyar*"! This is verily the result of Hindi on the *Mlechha-Bhasha* (English)!!

Wanted great law-teachers

According to Oliver Wendell Holmes "the purpose of a law-school is to teach law in the grand manner and to make great lawyers". Have we kindled in many a heart "an inextinguishable fire?"

Having been a teacher of English and law for twenty-seven years, the candid observations made herein, it is hoped will be taken as *bona-fide*.

In the recruitment of staff made to law-colleges since 1947, there has been a *fall in standards*. That throughout India, even appointments made to High Courts have included many mediocrities does not justify the fall in the stature of law-teachers. Two wrongs can never make one right.

Law stands to be illumined by *literature* and *philosophy*. A good law-teacher must have a *command of expression*. Above all, the law-teacher must *love* his work.

Teaching and Research

A good teacher is born. Where to strike

the golden mean between teaching and research? A law-teacher with twenty-one periods a week will have no time for *original* or *logical re-search*.

The ratio between the teacher and the taught must lie near the proportion of *one to thirty*. Granted such a proportion and a worthy library—the University Law College, Calcutta has the best law-library in India—if recruitment to the staff be made free from the shoals of *party-politics* in our Universities, I am sure that law-teaching will get to its own height.

Whole-time and part-time staff

The history of legal education in India is full of the contributions of great lawyers as *part-time* teachers. Whether it be Calcutta, Madras, Allahabad or Bombay, great advocates had shone as part-time professors of law. The head of the law-college should be a whole-time Professor with a *reputation* for law-teaching.

A few bases presumed

It is presumed in this note that the scale of pay of the teaching staff will be sufficient to *attract the best talent*.

I feel it my duty to *warn* my colleagues that we join the profession of teaching law not to pile up money but to *inspire* the generations-to-come. When I meet anywhere in India or abroad anyone of my 17,600 old students, it is a "*joy for ever*."

Let no one aspire to *kindle the torch of knowledge* who has *no urge to love* those entrusted to our care.



About Law, Lawyers and Laymen

By

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Diatribes against law and the lawyer are nothing new. Kipling saw in lawyers the "tribe who describe with a gibe the perversions of justice." Still popular is Goldsmith's line:

"Laws grind the poor, and the rich men rule the law."

Recently, however, fresh attacks have been launched from an administrative angle against the noble profession by the leaders of our citizens; but the man of law suffers no contrition of heart.

The source of these doubts of lawyer's honesty and of law's efficacy goes much deeper than the temporary distrust of the present system of administration of justice. There is an established tradition for it; and according to Dean Roscoe Pound this false tradition was "invented by twelfth-century priests and monks. For the most part clerical jealousy of the rising profession of non-clerical lawyers was the determining element.... Naturally, the clergy did not relinquish the practice of law without a protest." Whether one calls this explanation one of Dean Pound's "bed-time stories for the tired bar" or not, there can hardly be any doubt that the distrust of the legal profession is deep-seated in the mind of the ordinary man.

Men have, what Lord Justice Denning calls, an "instinct for justice". This instinct impels them to the belief that 'right', and not 'might', is the true basis of society. Law then must, therefore, be; for, it creates

rights and protect them against infringement; and lawyers are needed for its administration. It is not, therefore, without reason that Disraeli leaves out law from his categories of lies: lies, damned lies and statistics.

As for the layman, although he has accepted the shackles of civilization, he would nevertheless make certain demands of the law that curbs his impulses.

The first demand is that law must be just. This is in no small measure due to the influence which religion and morals have on law. In primitive societies religion, morals and law were indistinguishably mixed together. Their severance belongs to a much later stage of our mental growth; and even now our mind is not yet completely free from the mixed idea. Otherwise, why should we still make a witness take oath by the Bible or in the name of religion? The common law requirement of *mens rea* in a crime, which we have inherited from the Anglo-Saxon jurisprudence, is first found in St. Augustine's sermons, and then in the laws of Henry I it was laid down that *reum non facit nisi mens res*.

The practical reason for asking law to be just is that if the law is harsh and unjust people will be loath to observe it. In ancient times, for instance, when stealing anything worth more than forty shillings was punishable with death in England, a jury would solemnly find that a £ 5 bank-note was worth only 39 shillings! And any cri-

minal practitioner in India to-day will recall that it is far easier to secure conviction from the jury in a case of theft than under Sec. 302 I.P.C., the general consensus of opinion now being that the law relating to punishment for murder is unjustly harsh. In order, therefore, that people may accept positive law without grudge, it is necessary that the legal rules should conform as closely as possible to the prevailing notion of what is just and fair.

A particular rule of law which would be "fair" under certain social conditions may cease to be so under changed conditions, and strict enforcement of the rule will succeed only in giving rise to harsh, and possibly unjust, result.

As legal rules cannot be changed every morning, judicial interpretation comes to the rescue. Take as an example the English law relating to master and servant. As the master is liable for any wrong done by his servant in the course of his employment, it is of vital importance to decide whether the relationship of master and servant exists in a particular case. In earlier times the relationship was thought to depend on the right a person had to give directions to another as to the manner of doing the work. If this right existed, the relationship of master and servant was also held to exist between the two; but otherwise not—*Hillyer v. The Governor of St. Bartholomew's Hospital* (1909) 2 K.B. 820. This test alone became of doubtful value when it came to be applied to the employer of a captain of a ship or a pilot of an aircraft. Obviously, the employer could not be said to have any right to give orders as to the manner in which the ship was to be navigated, or the aircraft piloted. Nevertheless if the employer—invariably a solvent party—were to escape liability for negligence of the captain or rash flying by the pilot, many civil wrongs

would go virtually unredressed. Very recently, therefore, the established test has been held to be inapplicable as a sole criterion of relationship of master and servant under modern conditions. The relationship of master and servant now depends not so much on the submission of the latter to the orders of the former, as on whether the purported servant is part and parcel of the organization. Upon the same principle, nurses and doctors on the staff of a hospital, being part and parcel of the organization, are servants—*Gold and Others v. Essex County Council* (1942) 2 AER. 237; *Collins v. Hertfordshire County Council and Another* (1947) AER. 633. But see (1957) S.C.R. 152.

Perhaps the most remarkable change that has been brought by the judges upon law in recent years is in the doctrine of consideration in the law of Contract. The doctrine, once made permanent by the highest tribunal in England, viz., the House of Lords in *Foakes v. Beer* (1884) 9 App. Cas. 605, by which payment of a smaller sum was no consideration for the discharge of a larger sum, has now been thrown into the winds in order to do justice in a number of modern cases—*Central London Properties v. Hightress House* (1947) K.B. 130. Similarly, variations of contracts are now allowed without fresh consideration for securing justice under modern conditions—*Richards v. Oppenheim* (1950) 1 K.B. 616; *Plasticmoda Societa v. Davidsons* (1952) 1 Lloyd's Rep. 527.

This incidentally gives a picture of the changes that are taking place every day and shows the development of legal principles by the courts. In theory, however, the judges do not make law but only interpret it. But since no one knows what the law precisely is until the judges have interpreted it, it naturally follows that they do make the law.

Since the legislators cannot be credited with the gift of such prophecy as would enable them to make law to-day that will suit the social conditions of to-morrow, there will always be laws that are no longer just; and to administer these laws strictly would mean denial of justice. Hence the thesis that judges should not only apply the law justly, but apply just law. "The life of the law", writes Justice Oliver Wendell Holmes, "has not been logic; it has been the experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowmen, have had a good deal more to do than the syllogism in determining the rules by which men should be governed."

That brings us to the second demand the layman makes upon the law: certainty and predictability. The layman's proverbial contempt for the uncertainty of law is well-known. Of course, even Sir Ivor Jennings extolled the merit of certainty in law while considering the distribution of legislative power in our Indian Constitution. "Now the legislation," says he, "whose validity can be challenged is legislation which people will hesitate to obey. Since the practice of obedience to law is not well established in India, the result may be that much State legislation will be nullified by non-observance" "Now", Sir Ivor further adds, "this is a serious matter because experience elsewhere has shown that if persons are encouraged to disregard one part of the law, they tend to disregard all parts of the law."

But what Sir Ivor meant by certainty, is the certainty of validity of law; whereas the layman's certainty is the certainty of result. Certainty of validity, of course, there must be; but not so the certainty of result. Even in a less advanced and relatively static society there has never been any comprehen-

sive, immutable and eternized set of rules anticipating all conceivable legal disputes and deciding them in advance. The reason is that the science of law deals with human relations which are themselves so highly variable, that no one can foresee all the future groupings of emotional, psychological, economic, and social factors that go to constitute a legal dispute. In our present day dynamic society with its changing modes of production, novel methods of travel, economic planning, social security, welfare state and prohibition, the chances of securing any certainty would be even less. As Professor Goodhart puts it, "Scholars are realizing that the law is not a static concept which can be described as at rest, but is a continually changing whole which is, both consciously and unconsciously, being adapted to novel conditions."

While unpredictability is in the nature of law itself, the layman ascribes this to the men of law and believes that this lack of precision and finality is created, either deliberately or negligently, by the lawyers themselves, which helps to encourage needless litigation with its attendant increase in lawyers' fees. It is, therefore, not only proper, but necessary, that the public should be told the truth about legal system. They should be told that not only it is not possible to have laws that are fixed and rigid, but that rigidity in law is not even desirable. This is, however, not to say that there is no stability in a legal system. The law, they should be told, is a temporary compromise between the conflicting demands of the need of stability and the need of change. At any given point of time the law follows the rules of probabilities in the incessant conflict between stability and change.

It is the recognition of this conflict that induced the framers of our Constitution to introduce at least four types of provisions

for altering the Constitution, which would secure relative stability to the vital provisions, and at the same time, would render the others easy of amendment. Firstly, there are certain provisions of the Constitution which can virtually be altered or amended by our Parliament through ordinary legislation—as for example, Article 348(1) establishes English as the official language for a period of 15 years, *unless Parliament provides otherwise*. Secondly, Article 3 enables the Parliament to alter the boundary, the area, and even the name of a constituent unit of the federation by introducing a bill to the effect on the recommendation of the President and after ascertaining the views of the state affected by the bill. Thirdly, the process of Constitutional amendment is contained in Article 368 which requires a majority of the total membership in each House and a majority of not less than two-thirds of the members present and voting in each House of Parliament. And lastly, a further special provision in Article 368 requires not only the necessary majority but also ratification by the Legislatures of not less than half the States.

The third demand of the citizen is that, law should be enforced by independent and upright judges, in whom the people have confidence. Our Constitution has ample provisions to meet this very legitimate and vital demand. Our judges, both of the Supreme Court and High Courts, do not hold office merely at the pleasure of the President, but are removable only with the concurrence of the Legislature. Even the judges of the subordinate courts are appointed either upon the advice of the High Courts or an independent Public Service Commission. The salaries of these judges are on a scale suited to their responsibilities and calculated to ensure their independence and integrity.

As long as laws are passed by our repre-

sentative Legislatures, and enforced by the independent Judiciary, there can be no apprehension on the part of the people. But the difficulty arises, when the lay public is confronted, with a huge mass of administrative rules—several thousands of them a year—by our Welfare State, that pass for laws under the guise of delegated legislation. To the utter dismay of the laymen, these laws are administered not by the independent judiciary but by bodies called administrative tribunals and officers closely connected with administration. According to a recent statement made by the Union Minister of Law, there are no fewer than one hundred such tribunals operating under Central Acts. The deliberations of these tribunals are often outside the scope of judicial review in spite of Articles 32, 136 and 226 of the Constitution. For, not only the judicial control over the exercise of legislative powers by the executive is limited to the doctrines of *ultra vires* and *mala fide*, even the scope of judicial review of administrative action is very often restricted by the tendency to invest the ministerial officers with *subjective discretion* to act—*Nakkuda Ali v. M. F. De S. Javaratne* (1951) A.C. 66; *Province of Bombay v. Kusaldas Advani and Others* (1950) S.C.R. 621. The citizen is, therefore, left at the mercy of these administrative officers, whose bias in favour of administration, zeal for administrative action, impatience of delay, and lack of judicial training and temperament, make them unsafe repositories of public liberty.

The growth of administrative law and the consequent rapid increase in power of Government which had encroached upon the English common law doctrine of the freedom of the individual, set Lord Chief Justice Hewart to write on the New Despotism in 1929. It is the same problem that faces us to-day in India; and its seriousness was well recognised by the men of law in this coun-

try when they met at an Administrative Law Seminar in Delhi under the auspices of the newly formed Indian Law Institute, to find out how best the Welfare State and its Administrative Laws can co-exist with our new Democracy and its conception of individual liberty and the Rule of Law. No doubt the Administrative Law to-day poses one of the most difficult problems of modern times, namely, the conflict between Governmental power and individual freedom. The aim of our men of law should be, to quote from a recent speech of the Chief Justice of India, "to strike a balance between our social interest in the individual right to liberty and property, and our social interest in the advancement of the country as a whole."

Ours is not the only country that faces this problem; all the free peoples throughout the world have to solve it in some form or other. The French people have faced

it in a way peculiar to the French genius. The American people have brought out the American Administrative Procedures Act in 1946. The Frank Committee in England presented its report to the British Parliament last year to meet the situation. While there is not the slightest doubt that our men of law—judges, lawyers and statesmen—would be able to strike the happy balance our Chief Justice referred to in his recent speech and thus fight the battle for the citizen's freedom; the citizen, on the other hand, remains ignorant of the fact that it is the same lawyer whom he has always viewed with suspicion and distrust, who now helps him out of the clutches of the all-powerful Government and places him in the well-ordered deencies of civilization. The lawyer has always stood by the layman in his times of peril, but the praise of the lawyer has always remained not only unheard but unsung. Must it always be so?

"Ignorance of the law excuses no man: not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to confute him."

The Problem of Berubari and the Constitutional Position : A Note

BY

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Is there any provision in our Constitution under which any portion of the territory of India may, if necessary, be *lawfully* ceded or transferred to a foreign State? This question has been raised in connexion with the issue of the proposed transfer of a part of Berubari Union in the District of Jalpaiguri, West Bengal, to Pakistan under what is popularly known as the Nehru-Noon Agreement. It has been seriously argued by many people, amongst whom there are, strangely enough, some lawyers, that under the Constitution of India as it is today, no part of the territory of India can be ceded or transferred to any foreign State by any authority in India.

It is difficult to agree with this view. Whatever may be the moral and political aspects of the particular question of Berubari—and we are not concerned with them here—, juristically speaking, there is, it is submitted, no *constitutional* bar, subject to the special requirement in the case of the State of Jammu and Kashmir, and notwithstanding anything in Article I of the Constitution, to the cession or transfer of any part of the Indian territory to any foreign State under an international agreement duly entered into on behalf of this country by a competent authority. This will be evident from the following express provisions of our Constitution, considered along with what is known in connexion with the construction

of constitutional documents as the doctrine of implication or implied powers, namely, Article 253 and Entries 10, 13 and 14 in the Union List in the Seventh Schedule to the Constitution. Thus we find in Article 253 of the Constitution:—

“Notwithstanding anything in the foregoing provisions¹ of this Chapter,² Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.”

And Entries 10, 13 and 14 in the Union List referred to above, are as follows:—

“10. Foreign Affairs; all matters which bring the Union into relation with any foreign country.

“13. Participation in international conferences, associations, and other bodies and implementing of decisions made thereat.

“14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions with foreign countries.”

¹ I.e., Articles 245-52 of the Constitution of India.

² I.e., Chapter 1 of Part XI of the Constitution of India. It deals with the question of distribution of legislative powers in India.

These express and unambiguous provisions of our Constitution, quite, we submit, sufficient in themselves for declaring the intention of the framers of the Constitution, may also be construed according to the accepted rules of construction. And here comes in the doctrine of implication or implied powers. Now, what does this doctrine really mean? Let us see what some eminent jurists say in regard to it.

While delivering the judgment of the Supreme Court of the United States in *McCulloch v. Maryland*, Chief Justice Marshall stated in 1819³:

"The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means. . . . We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution (of the United States) must allow to the national legislature (i.e., Congress) that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people."

Justice Story has observed⁴:—

"Where the power is granted in general terms, the power is to be construed as co-extensive with the terms, unless some clear restriction upon it is deducible from the context. . . . A restriction founded on conjecture is wholly inadmissible. . . . Every form of government unavoidably includes a grant of some discretionary powers. It

would be wholly imbecile without them. It is impossible to foresee all the exigencies which may arise in the progress of events connected with the rights, duties, and operations of a government. . . . In the interpretation of a power, all the ordinary and appropriate means to execute it are to be deemed a part of the power itself. This results from the very nature and design of a constitution. In giving the power, it does not intend to limit it to any one mode of exercising it, exclusive of all others. It must be obvious. . . . that the means of carrying into effect the objects of a power may, nay, must be varied, in order to adapt themselves to the exigencies of the nation at different times."

Justice Cooley has said⁵:—

"The implications from the provisions of a constitution are sometimes exceedingly important, and have large influence upon its construction. In regard to the Constitution of the United States the rule has been laid down, that where a general power is conferred or duty enjoined, every particular power necessary for the exercise of the one or the performance of the other is also conferred."

Justice Cooley quotes in this connexion an extract from the judgment of the Supreme Court of Illinois in *Field v. People* (3 Ill. 79, 83) to say⁶:—

"That other powers than those expressly granted may be, and often are, conferred by implication, is too well settled to be doubted. Under every constitution the doctrine of implication must be resorted to, in order to carry out the general grants of power. A constitution cannot from its very nature enter into a minute specification of

³ *McCulloch v. Maryland*, Supreme Court of the United States, 1819: 4 Wheat. 316.—See Walter Dodd, *Cases and Materials on Constitutional Law*, 1949, pp. 450 and 454.

⁴ See Joseph Story, *Commentaries on the Constitution of the United States*, Vol. I, 5th Edition, 1905, Sections 424-30.

⁵ See Cooley, *A Treatise on the Constitutional Limitations*, 7th Ed., 1903, p. 98.

⁶ See *Ibid.*

all the minor powers naturally and obviously included in it and flowing from the great and important ones which are expressly granted. It is therefore established as a general rule, that when a constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one or the performance of the other."

Referring to the system of government in the United States, Professor Willis has remarked⁷:—

"While the federal government is a government of delegated powers, yet these powers include not only the powers expressly granted, but also those implied as a fair implication from the express powers granted This means that the federal government has all the incidental and instrumental powers necessary and proper to carry into execution all of its express powers. The people who established the federal government did, it is true, limit the sphere of action of the federal government, but within that sphere they undertook to make it move with supreme authority. Thus, the power to incorporate a bank of the United States has been implied from the express powers of the federal government to collect taxes and to borrow money (*McCulloch v. Maryland*, 1819, 4 Wheat. 316). The power to issue legal tender notes was first implied from the express powers to make war, to borrow money, to coin money, and to issue bills of credit (another implied power) (*Legal Tender Cases*, 1870, 12 Wall. 457). . . . The power to punish officers of elections at which representatives are chosen for violation of duties imposed by state or federal law was implied from the express power of Congress over elections (*Ex parte Siebold*, 1879, 100

U.S. 371)⁸. . . . The power to pass an employers' liability act was implied from the express power to regulate commerce (*Second Employers' Liability Cases*, 1912, 223 U.S. 1). . . ."

Finally, we find in Maxwell¹⁰:—

"The object of all interpretation of a statute is to determine what intention is conveyed, *either expressly or impliedly*,¹¹ by the language used, so far as is necessary for determining whether the particular case or state of facts presented to the interpreter falls within it."

Again—

"Where an Act confers a jurisdiction, it *impliedly*¹² also grants the power of doing all such acts, or employing such means, as are essentially necessary to its execution . . . when powers, privileges, or property are granted by statute, everything indispensable to their exercise or enjoyment is *impliedly*¹³ granted also. . . ."

We have shown above at some length, with reference to the views of some eminent jurists, what the doctrine of implication or implied powers really means. It should be evident from what we have shown that under this doctrine powers specifically or expressly conferred upon any authority in a State automatically involves, in the absence of any clear constitutional provision to the contrary, such other powers as are necessary and proper for the effective exercise of the

States has been derived by implication. Punishment of offenses against the revenue, the postal service, for malfeasance in office, etc., has been necessary to secure the due and effectual operation of laws made by Congress in the exercise of its enumerated powers."—See *ibid.*, p. 218n.

⁹ For further illustrations, see *ibid.*, pp. 217-20.

¹⁰ See *Maxwell on the Interpretation of Statutes*, 10th Ed., p. 2 and pp. 361-62.

¹¹ The italics are ours.

¹² The italics are ours.

¹³ The italics are ours.

⁷ Willis, *Constitutional Law of the United States*, 1936, pp. 217-20.

⁸ "In the same way", Professor Willis has also remarked, "the entire criminal law of the United

powers specifically or expressly granted to it. Now, under the express provisions of our Constitution referred to before, and the doctrine of implication explained above, the Centre in India can, subject to what we have said before in regard to Jammu and Kashmir, and in spite of Article 1 of the Constitution, certainly, if necessary, cede or transfer any part of the territory of India to a foreign State under an international agreement to which India is a party. Of course, by the word "Centre" here we mean not merely the Central Executive but also the Central Legislature, that is, the Parliament of India. The Central Executive may, under Article 73 of our Constitution, take the initiative in an international negotiation, but the implementing of any treaty, agreement or convention resulting therefrom, requires necessary legislation by our Parliament. This appears to us to be the law of our Constitution.

The sovereignty of the State of India has been established over every part of its territory since the 26th of January, 1950. That sovereignty cannot be destroyed now in any part of the territory by a mere executive action. Necessary legislation by our Parliament is required for this in accordance with the provisions of our Constitution. Otherwise, there will be a flagrant violation of the Constitution, leading ultimately to the establishment of executive despotism in the country. If necessary, there may be permanent Acts of our Parliament providing for the adjustment, by our Executive Authorities, of boundaries, from time to time, between India and Pakistan in border areas through which what are known in International Law as "boundary rivers" flow. It has also to be borne in mind in this connexion that the requirements of Article 3 of our Constitution have to be duly fulfilled when the area or the boundaries of a consti-

tuent State of India are going to be adversely affected, or altered, by any proposed cession or transfer of territory. But these are all, more or less, procedural matters.

The object of this Note is to combat the view that under the present Constitution of India no part of the territory of India can be ceded or transferred to any foreign State by any authority in India. As we have shown above, there is no constitutional bar to such cession or transfer in certain circumstances. We may even go so far as to say, for the sake of argument, that even if the express provisions referred to before, were not there in our Constitution, under the Residuary Powers of Legislation vested in it by Article 248(1) of the Constitution and Entry 97 in the Union List (Seventh Schedule), considered along with the doctrine of implication, our Parliament could by necessary legislation cede or transfer any part of the Indian territory (minus Jammu and Kashmir), to a foreign State under an international agreement. Juristically speaking, there would be no difficulty. Recourse to the adoption of this extreme view, however, is not necessary in view of the express provisions in our Constitution quoted before.

In conclusion, we should like to repeat that in this Note we have dealt with the question of Berubari purely from a constitutional point of view. It has absolutely nothing to do with the merits of the question. So far as that is concerned, there is, regard being had to all that has so far appeared in the Press, much to be said on behalf of those who are against the proposed transfer of any part of Berubari Union to Pakistan. Further, it seems to us that questions like Berubari should be chiefly fought on moral and political grounds, and not on any constitutional ground. Otherwise, the fight will be on a very weak and assailable ground.—11th April, 1959.

Independence of Judiciary and Socialist Pattern of Government

By

PROFESSOR S. A. MASUD, M.A., LL.B., *Barrister-at-Law.*

Independence of Judiciary, *prima facie*, seems to be quite consistent with any modern system of Government. After all, the task of a judge is to apply law to the evidence adduced before him. A judge as a judge cannot make law nor is he concerned with the necessity, expediency of law or policy behind it. It is true, by way of legal fiction and exercise of judiciary discretion, he, in his application of law to facts, interprets law and while interpreting exercises his right and introduces new propositions which have not been fore-seen by the legislators. But apart from such indirect law-making function of a judge, he must act within the four corners of law, be it, statutory, personal, or customary, and cannot over-ride prevailing laws. Now, it is not very relevant to find out whether such laws are in consonance with democratic system of Government prevalent in England or America or with socialistic form as envisaged and implemented in Russia or China. A judge under a socialist or a communist Government will also apply its socialist or communist legislations or ordinances to facts of individual cases and there is no logical inconsistency in his discharge of functions as it is also possible in a democratic set-up. But to explain the relationship of judiciary and socialism or a socialist pattern of Government in this manner is to oversimplify the problem and to avoid the real issue. If one always tries to approach a problem in such a slipshod and general way,

all problems cease to be controversial. Even Kantian ideal—"Man is free if he needs to obey no person but solely the laws"—would also fit in with any system of Government. Thus, to understand the subject in its proper perspective, one has to probe deep into the connotation and meaning of the expression "Independence of Judiciary" and "Socialist pattern of Society".

Independence of judiciary involves dispensation of justice without fear or favour. This is possible when a judge is free to do his who has a character, integrity and learn-judicial work without any influence of the Executive or parliamentary pressure. A judge ing, who holds the scales of justice even between subject and subject, can discharge his judicial functions, when he knows that there is no chance of his removal in the event of any adverse decision against the Government or that there is at least a remedy against his unwarranted removal. Besides, a judge in discharging his duties of the office of trust must possess and display freedom from prejudices, dogmas and preconceptions. Further, fairness of a trial is another outstanding feature of an independent judiciary. But the fairness does not merely mean fairness in determination of the issues of a case, but includes the appearance of fairness to litigants concerned. The Rule of Law as propounded in Dicey's *Law of Constitution* can only be implemented in an independent judiciary. No man is above law and nobody

can be lawfully made to suffer except for distinct breach of law established in the ordinary legal manner before ordinary court of laws.

Before any attempt is made to find out the relationship between an independent judiciary and socialist pattern of Government, the meaning of the latter expression should be understood. Socialist Pattern is a nomenclature, not common outside India. The expression has been explained in the official publication of the Government of India in the following manner: "The task before an under-developed country is not merely to get better results within the existing framework of economic and social institutions but to mould and refashion these so that they contribute effectively to the realisation of wider and deeper social values. These values or basic subjectives have recently been summed up in the phrase "Socialist Pattern of Society". Essentially, this means that the basic criterion for determining the lines of advance must not be private profit but social gain and that the pattern of development and the structure of socio-economic relations should be so planned that they result not only in appreciable increases in national income and employment but also in greater equality in incomes and wealth." It is therefore more a way of life, and philosophical approach than a rigid dogma or a particular system of institutional or conventional arrangements. It therefore envisages (a) increase in national income, (b) rapid industrialisation, (c) expansion of employment opportunities and (d) reduction of inequalities in income and wealth and a distribution of economic power. This has to be effected by increasing government operation of basic and heavy industries in place of its ownership by profit-motivated individuals and by allowing privately-owned economic enterprise to run under Government regulations.

Hayek, in his well-known work, "*The*

Road to Freedom" has tried to establish that a socialist estate is a deadly enemy to the Rule of Law. Firstly, National economic planning involves deliberate discrimination by Government between particular needs of different people; Secondly, delegation, of discretionary power to diverse Boards and Authorities and consequential exercise of such power negative Rule of Law. Harry Jones, the Cardozo professor of Jurisprudence, Colombia University, on the contrary, optimistically holds that if administrative officers are as fair as judges, Rule of Law is not incompatible with a socialist state. But these extreme views may be logically tenable or theoretically possible, but they would not be helpful guidance to the people's requirements. Of course, a country or its people is more important than political parties or their ideologies. The question whether the social, economic and political justice, as set out in the preamble to our Constitution, is to be achieved by Western conception of democracy or Dicey's idea of Rule of Law or by giving superior value to materialistic needs and economic progress of the people through State or Government control is a matter of political conviction and extra-legal consideration. But it seems that an over-all material progress of a country and the phenomenal increase of economic standard of life by itself cannot be conducive to the fulfilment of the individual. After all, justice, whether economic, social or political, is to be concretely achieved by the individuals and for the individuals, and this individual is both flesh and spirit. A man with no want of materialistic needs of life but without any freedom of expression in matters of religion, political thinking, literature, art etc. cannot be an example of an ideal state of affairs in a country.

Socialist pattern of Government subverts the animality and the divinity in the man and it does recognize the importance

of some basic universal values or innate or natural rights of a man, which are not allowed to be gradually engulfed or swallowed by the economic needs of a state or a country, as a whole.

Thus, if socialist pattern remains pattern only and is not converted into or is not merely a transitional stage to a full-fledged socialist state, there is a scope for freedom or importance of judiciary. The fundamental rights may have to be abridged to a large extent to achieve the national wealth of the country and for reduction of prevailing fantastic economic inequality of men, but they cannot be altogether wiped off or abrogated. A judge would, therefore, in such a system, not only prevent the encroachment of the Executive on the rights

of the individual, but would also see that the Principles of natural justice or *Jus Naturalis*, are respected and arbitrary executive fiat is arrested. Besides, if a judge knows his appointment, promotion and dismissal depend upon the pleasure or displeasure of the Executive, he can hardly afford to be independent. In a socialist pattern of Government, the judges need not be afraid of their promotion or removal at the whims of the Executive. The independence is assured, because security of their office is protected by the Constitution of India and its fundamental rights. But whether such a socialist pattern of government can effectively fulfil the objectives which they hope to establish through the existing machinery or agencies, posterity alone can say.

*"Small souls enquire, 'Belongs this man
To our own race or sect or clan?'
But larger-hearted men embrace
As brothers all the human race."*

Towards Establishing an International Legal Order

By

DR. DEBIPROSAD PAL, M.A., LL.M., D.LITT.

The problem of an effective international order based on rule of law has acquired greater importance and a newer emphasis because of the fundamental and far reaching developments in international relations since the two world wars. The two world wars have brought to the surface a tendency which had been at work for a long period before its outbreak. The stage has now ceased to be dominated by the sovereign states with their pretension to be universes in themselves. In this new world their independence is limited in one or other ways. Even the Greater Powers are dwarfed in the economic sphere by the world-wide scale on which Industrialism has now come to conduct its operations. In this new world all but the strongest or the most recalcitrant states are feeling less and less able to stand by themselves economically and militarily, and are kicking violently against the pricks by turning for assistance by the surrender of some governmental functions implied in the recently established international organisations. In this new age, the dominant note in the corporate consciousness of communities is a sense of being parts of some larger universe, whereas, in the age which is now over, the dominant note in their consciousness was an aspiration to be universe in themselves.

Thus with the growing interdependence among the various units of the world and the deadliness of our present weapons, it is

perhaps an inescapable conclusion that the world is in any event going to be unified politically in the near future. But the really formidable political issue to-day is not whether the world is soon going to be unified politically but in which of two alternative possible ways this rapid unification is going to come about and what will be the pattern of the unified world-society.

The two alternative possible ways of such unification are suggested. One is by continual rounds of wars ending in the survival of only one great power which would succeed in knocking out its last remaining competitor and would *impose* 'peace' on the world by conquest. The other is by finding a co-operative way out of the present day troubles: The present political pioneering enterprises of substituting the humane device of constitutional government for the blind play of the physical force in the conduct of international relations give rise to this hope.

There is yet suggested a third possibility which however is not one of unification of the world but of continuous designed conflict. The suggestion is that the number of great powers will dwindle to three and these three powers will succeed in holding their respective people under permanent serfdom keeping them in continuous terror of war.

It may be pertinent here to point out that the character of modern war has changed and there are many who think that the pre-

sent trend in warfare is entering upon the Orwellian phase as analysed and described by George Orwell. According to Orwell, war hysteria will in "Nineteen Eighty Four" be continuous: the prevailing moods, he declares, will be, "fear, hatred, adulation and orgiastic triumph."

We need not for our purpose consider whether Orwell's explanation must be accepted that the underlying purpose of the existing trend towards the establishment of a permanent war economy and a state of continuous cold or phony warfare is due to a conscious desire "to deprive the masses of the fruits of an ever-expanding technology". Whatever the explanation may be, there can be little dispute that this trend exists.

The real lesson to be drawn from all this is that if we wish to escape from either the tyranny, intimidation and austerity of a "Nineteen Eighty Four" regime we must repudiate the cold-war strategem and imposition of "perpetual war for perpetual peace" and return to a truly pacific internationalism.

It can be hardly denied that the two world wars and their aftermath have inspired in the great mass of mankind a revulsion against war far greater than existed ever before. The "fresh terrors and undreamed of fears" engendered by the annihilating mechanisms of modern war have brought about a situation in which even the most unreflecting can no longer contemplate the coming of war without dismay. It is now increasingly felt that war between major Powers threatens human existence itself. We are on the threshold of an era in which the mad race for armaments and successive inventions of diabolical engines of destruction may make the continuance of life on earth an impossibility. In the altered perspective of to-day what is demanded now is a new orientation of man towards the conception of state and state-sovereignty, a conception

which has proved to be tragically incongruous with the changed conditions of human life.

We have seen that the society that has given us the kind of history we have been surviving for the past forty years is a mortally sick society. It is a society in convulsion, caught in a whirl-pool of cause and circumstance that leads us to an end which nobody wants. It seems we are living in an age when every "reasonable" approach halts before a stone-wall of unreasonable fact. We are living as it were in a mad house where delusions govern amid hopeless and needless sufferings, where myopia and fear obscure the most elementary demands of our true self-interest.

This dementia of our time is largely the result of a gross contradiction between our existing socio-political institutions and the productive capacities and potentialities offered by our technical civilisation, of a lack of correlation between progress in technique and progress in civilisation.

The problem has acquired new and terrifying urgency because of our growing realisation that our civilisation is undone if we cannot overcome the anarchy in which the sovereign nations live. The crisis in the theory of national sovereignty of state is nothing but an expression of the new need to enlarge the new economic units of the world. In fact, the triumphant voyages of Vasco de Gama and Columbus seem to be carrying us now into seas than run so high that Leviathan himself can scarcely breast the waves. In the new and altered conditions of our time, the world itself has become the minimum unit of necessary change.

Standing at the cross-road of world history, it is perhaps incumbent upon us to realise that the economic interdependence of the world places us under the obligation, and gives us the possibility, of enlarging the

human community so that the principle of order and justice will govern the international as well as the national community.

The new and compelling task of our present generation is to build up an effective international order which will bring the present chaos and anarchy in international relations to an end. We are driven to this task by the lash of fear as well as by the incitement of hope.

If we fail to achieve this in the near future by the method of pacific adjustment, it is likely to be achieved by the alternative method of 'the knock-out blow' in which a war—or a series of wars—of attrition will end in the decisive and definitive victory of one single Power through the annihilation of all the rest. The destiny of mankind depends upon which of these two alternatives we in our generation choose.

Thus the problem before us is not simply one of "controlling" atom bombs or other weapons of war, but of rooting out the causes of war. It is not a matter of smoothing out the jagged edges of self-expanding spheres of influence but of abolishing spheres altogether. It is not a matter of adjusting boundaries or economic barriers but of levelling them. It is in short a matter of the whole context of society. It is a matter of transforming the world and the way we all live in it.

No doubt the best that we could produce out of the cataclysm of the war was the United Nations Organisation. If the United Nations Charter were to-day to be scrapped and the effort to be made to bring about a general international agreement upon a world government, humanity would secure neither would government nor any thing other than chaos. Yet doubts are not infrequently felt as to whether the United Nations, like the League of Nations before it, is really based upon the acknowledgment

that the world must function on a unified basis or not at all. It is a crude expedient resting primarily on the old ideas and premises. It is often considered as "at best a mild check or rapacity, at worst a thin cloak for it. It is a mirror of our world, not an instrument for changing it."

The truth is that we do not yet have a world community—only a halting and hesitant beginning towards one. The tragic fact still remains that even after the several demonstrations of the atomic bomb, the statesmen of the great nations appear often not to realise the necessities imposed upon them by the growth of a world civilization. So long the world community does not possess this potent elements of "togetherness" which is the characteristic feature of national communities, the principle of national sovereignty remains the legal symbol for social realities, the legal expression of the fact that national communities regard themselves as legally and politically autonomous.

Arguments for world government rest upon the simple pre-supposition that the desirability of world order proves the attainability of world government.

Such arguments are based upon the assumption that nations need merely follow the alleged example of the individuals of another age who are supposed to have achieved community by codifying their agreements into law and by providing an agency of some kind for law enforcement. Such theorists talk of calling a world constitutional convention which would set up the machinery of a global constitutional order and would then call-upon the nations to abrogate or abridge their sovereignty in order that this newly created universal sovereignty could have unchallenged sway. It may however be pointed out that no such explicit abnegation has ever taken place in the history of the world. Indeed the notion

that world government is a fairly simple possibility is the final and most absurd form of the "social contract" conception of government which has confused modern political thought since Hobbes. No group of individuals has ever created either government or community out of whole cloth.

In fact the fallacy in world government theories is to be found in their conception of the relation of government to community. Governments cannot create communities for the simple reason that the authority of government is not primarily the authority of law nor the authority of force, but the authority of the community itself. Hence the community cannot be coerced into a basic order unless it exists in fact; the basic order must come from its innate cohesion. Thus we shall have to face the delicate task of creatively stabilizing an inchoate community of nations in a civilisation which can achieve stability in global terms.

Those who think that an imposed world government supported by some kind of international police will be able to maintain an adequate world organisation are under a misconception as to the essence of law and force in particular and of social organisation in general. Indeed the proposition that simply by the imposition of such a legal order, the present anarchy in our international life can be brought to an end perhaps takes a limited view of the problem. Such theorists forget that the harmony of communities is not simply attained by the authority of law. *Nomos* does not coerce the vitalities of life into order. We must look beyond legal enactments to the whole structure and organisation of the community. The social harmony of our international life can be achieved by an interaction between the normative conceptions of morality and law and the existing and developing forces and vitalities of the international community.

Doubts are frequently expressed as to whether international society can ever develop into one or whether the state must remain the largest community. Such questions often miss the point that there is nothing final about the present pattern of nation-states. All of these represent amalgamations of smaller communities that were once more independent than they are to-day. This evolution of the state indicates that the size of communities is variable and that there are no inherent limits to further expansion.

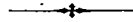
We must not forget that the expansibility of communities does not automatically bring about their expansion whenever that becomes desirable, as in the world to-day. On the other hand their enlargement to adequate dimensions, being a psychological process, may be often slow and painful because human beings are more ready to adjust to technical innovations than they are to change their attitudes.

Moreover, sociologists point out that the vital factor in a small community is that every human being is a member of one small enough for him to experience personally and practically the various facets and the reality of community. But the larger community is mostly an abstract one, existing essentially in the minds of men. Hence community is not constituted by like interests but by "like interests become common through recognition and establishment." In fact the two basic prerequisites of successful world organisation are, on the objective side, a sufficient intensity and permanence of contact between nations and on the subjective, a co-operative attitude among the members of the organisation. What is required, therefore, is a conviction among the peoples of the world that those interests served by war or by the state could better be served by a world organisation constructed to preserve peace.

If any world organisation has any chance of survival in this dynamic age it must have to meet the dilemma between the need of order and stability on the one hand and the need of adaptation to new conditions on the other, between the need to uphold and enforce the existing order as well as to reconsider and revise it.

It cannot be denied that the problem engendered by this new cycle of civilisation ushered in by science and technology has presented us with an unprecedented challenge involving a terrifying problem of adjustment, the velocity of life has entered into such a new, unforeseen and unimaginable phase that any effort to establish a social structure to contain that velocity involves super-human energy. The adjust-

ment we are seeking for must not be a mere compromise but a real response which can settle the tasks presented by the situation. It must not be mere mechanical in which only one response is possible to a given stimulus. It must be so that the adjusted organism relates its inner and overt behaviour to the requirements of the surroundings. These demands are certainly too severe and exhausting; in facing them civilisation is perhaps consumed by anxiety and fear. Man to-day is called upon to organise beyond his moral and emotional means. This may be the reason why the process of establishing any international society is proving to be prolonged, bloody and exhausting and perhaps there may be no premature escape from the guilt of history.



"There is no other destiny than our own past efforts. Our past actions alone constitute our destiny."

Time Ripe for an Amendment

Sec. 497 of the Indian Penal Code

By

SRI GITESH RANJAN BHATTACHARJEE, B.Sc., LL.B.

Indeed there is little scope for denying the fact that adultery is a social evil. Marital privacy and confidence is the most enduring solace of married life; and any large scale misappropriation of this privacy and confidence is sure to bring domestic broils and social demoralisation so as to convert the entire society into a big brothel which no sane man desires and every sane man condemns. This is why adultery figures in the penal law of many nations. We have in India provisions for punishing for the offence of adultery and Sec. 497 of the I.P.C. stands for the purpose. But the Section embodies provisions which are peculiar to some extent and the scope of the present article is limited to discussions of those peculiarities in brief. The Section runs thus: "Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse *not amounting to the offence of rape*, is guilty of the offence of adultery, and shall be punished with imprisonment...In such case the wife shall not be punished as an abettor."

The Section makes it categorically clear that for the offence of adultery the male participant is to be punished alone and the female counter-part is not to be liable as an abettor even. It seems therefore that so far as adultery is concerned females enjoy a cent per cent immunity from being punished. Now on analysing the ingredients of

the offence of adultery it clearly appears that the offence arises out of a *bilateral concerted act* of a male and a female. To bring the case within the ambit of Sec. 497, I.P.C., the sexual intercourse between a man and a married woman must not amount to rape which obviously means that such intercourse must be with the free consent of the married woman. (For rape please refer to Sec. 375, I.P.C.). Is it not therefore shocking to the sentiment of any rational being that the whips of justice should fall on the back of the male participant alone for an offence which arises out of a *bilateral concerted act* in which the man participates at least with the free consent of, if not under an active inducement by, the woman counterpart? Apart from this sentimental aspect, there is yet a practical aspect which deserves serious consideration. The purpose of the Section (viz. Sec. 497 I.P.C.) is surely to prevent the commission of the offence by a threat of punishment. But how far this purpose has been successful is yet to be assessed. I think, the statistics will not be much satisfactory and this is quite likely where one of the parties to such a *bilateral concerted act* is at liberty with impunity to induce the other to enter into such act. The attraction between two opposite magnetic poles cannot be totally annulled by merely destroying the magnetic character of one of the poles alone. Hence it is no wonder that the present provisions of the Sec. 497 I.P.C. will prove themselves sufficiently liberal in allowing a considerable inroad for the occur-

rence of the evils the Section was initially designed to resist. The remedy, therefore, is to introduce an amendment in the Section.

In this connection it will be of immense interest to study the reasons given by the authors of the code for escorting the females from the mischief of the Section. They observed: "Though, we well know that the dearest interests of the human race are closely connected with the chastity of women and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead a humane man to pause before he determines to punish the infidelity of wives. The condition of women of this country is, unhappily, very different from that of the women of England and France; they are married while still children; they are often neglected for other wives while still young. They share the attention of a husband with several rivals. To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt. We are not so visionary as to think of attacking, by law, an evil so deeply rooted in manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain, operation of education and of time. But while it exists, while it continues to produce its never-failing effects on the happiness and respectability of women, we are not inclined to throw into a scale, already too much depressed, the additional weight of penal law." (Note Q, p. 175, Draft Penal Code, 1836).

The reasons given above for not punishing a wife seem neither convincing nor satisfactory. However, what moved the authors of the Code to be so much liberal in favour of women, it seems, was the status and position of women in society. But since then a century has passed away. It is high time

now to judge whether the century-old outlook can yet be maintained in the perspective of the revolutionary changes in various spheres which the society has undergone during these hundred years. Today almost in every sphere of activities, the females are taking equal part with males and their progress in this respect is really amazing. Both socially and legally now they are enjoying almost equal benefits with males. The disabilities of females specifically mentioned by the authors of the Code also cease to exist today. Under the Hindu Marriage Act 1955, there is a specific age-limit which ensures sufficient maturity below which a girl cannot be legally married; marriage also is no more an indissoluble tie which would become perfect only on the completion of the ceremonial seventh step. Today any marriage brought about by force or fraud or with a lunatic, idiot or an impotent person is voidable; also a woman is no more required to share the attention of her husband with several rivals, for, bigamy being prohibited a husband cannot any more procure to have two wives at the same time; besides, marital tie is no more indissoluble; any wife can today divorce her husband on one of the specified grounds. So far as Muslim women are concerned, though they are, in the language of the authors of the Code, yet required to share the attention of husband with several rivals, still under the Dissolution of Muslim Marriage Act 1938, a Muslim woman can now procure a decree for the dissolution of marriage on one of the specified grounds, such as, inequitable treatment of the husband having more wives than one, or husband's failure to perform marital obligations for three years or husband's association with woman of evil repute, etc.; also the same Act allows under certain conditions considerable latitude for a Muslim girl to avoid the marital tie where she was given in marriage by her guardian before she at-

tained the age of fifteen. All the provisions mentioned above directly eradicate the roots of the evils which evoked sympathy in the minds of the authors of the Code. Hence, it is high time now to change the outlook on which the provisions of the Section were originally based. The possibility of such a change, as it will appear from the authors' expression quoted above, was also contemplated by the authors themselves.

In the perspective of the facts discussed above, it can be expediently concluded that Sec. 497, I.P.C. does not any more deserve existence in its present form. Such an existence will not only be unjust and inequitable but will be positively injurious to the well-being of the Society. Previous to Hindu Marriage Act 1955 and Hindu Succession Act 1956, women, though exempted from penal liability for adultery were however subject to some indirect checks. Thus prior to Hindu Marriage Act 1955, a wife might not dare commit adultery lest her husband abandons her and marries a second time, but now she is free from any such fear, for, under the said Act a husband cannot marry second time unless he first divorces his existing wife in which case the wife also becomes entitled to procure a second marriage. Hence, now an infidel wife who is not desirous of living any more with her husband may very well indulge in committing adultery without incurring the risk of

any penal liability and thus manufacture a ground for her husband to divorce her, which will be the ultimate resort of the disappointed husband and which the infidel wife might desire. In such case, *from the very nature of the acts involved in adultery*, it is quite obvious that Sec. 497 which purports to put only a unilateral check, will be of meagre effect where one of the parties is at liberty to induce the other in entering into such act. Also, prior to Hindu Succession Act 1956, females of certain categories were excluded from inheritance on the ground of unchastity. But now under the said Act, unchastity is no more a ground of exclusion from inheritance. The reaction of these provisions and concessions together with the existing provisions of Sec. 497 I.P.C. may not prove much pleasant and decent to our society, *a trend of which is not already very rare.*

I conclude here with a warning to our legislators that unless a timely step is taken now in order to remodel Sec. 497 I.P.C., so as to make both man and woman equally liable for the offence of adultery, it may be too late in future to bring the desired effect even by any amendment that might be made then, because, if once a practice pervades in large-scale it will be a very difficult task to resist that by mere change of words in a Section.



*"Virtue is the only friend which follows us even beyond the grave,
Everything else ends with death."*

Land Tenure Systems in India & Their Reforms

By

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(I) IMPORTANCE:

The word 'tenure' is derived from the Latin word, 'teneo', which means 'to hold'. Land tenure therefore, in general connotation refers to the conditions in which land is held.

In a country like India, where agriculture is the premier national industry, land tenure system plays a most dominant role in both economic and social life of the people. The land tenure systems prevailing in India to-day are the results of historical and political factors on a gradual process of evolution, and India, with a variety of her natural resources and geographical conditions presents a variety of land tenures as a consequence.

(II) PAST DAYS:

If we trace the earlier history, we shall observe that, in the Hindu period, land belonged to the village community and was not regarded as the personal property of the king. But there was a fixed traditional share for the king.

Under the Moslems, different tenures and tax systems were adopted, but they reduced the Hindu customs and infused the regular records and revenue accounts and made a fixation of land revenue for them. Under Akbar, to collect regular revenue, headmen or tax-farmers were employed, and by the 17th century, zemindars, assignees, tax-far-

mers strengthened their position, which became hereditary however.

When East India Company assumed political control they accepted this traditional system, but the character of the land system was transformed on the basis of British legal concepts in India. However, a brief analysis as pictured below, is necessary to make our conception clear.

(III) TYPES OF LAND TENURES

PREVAILING IN INDIA:

Owing to strong historical reasons, we find three main types of land tenures till the recent legislations enacted in India for land reforms.

(a) *Zemindari*:

It was a creation of British regime and many non-economic considerations crept into this system. The zemindar was the owner of land and was responsible for paying revenue to Government. This settlement was recognized as Permanent Settlement. Zemindari tenure has been prevalent in West Bengal, Bihar, Uttar Pradesh, Madhya Pradesh and Madras.

Contrary to expectations of its authors, the system brought in its trail many harmful consequences both to the cultivator's interests and the agricultural prosperity of the country. Here the zemindar was called "the distant suction pump", as he had no

intimate relationship with the tillers of the soil, who were subjected to rack-renting and virtual supersession of their legal positions because of unreasonable and extortionate demands by the zemindars.

(b) *Ryotwari* :

Under this system, every registered holder is the proprietor and pays revenue to the Government. This prevails chiefly in Bombay, Madras, Assam and Madhya Pradesh. It has got certain merits like, direct contact with the cultivator, absence of parasitic middlemen, possibilities of effecting measures for consolidation, large-scale farming etc. Chief defects are the conservative habits of ryots, temporariness and uncertainty of the system, deliberate negligence on the part of the tillers to make improvements, heavy expenses of the Government in time of surveys and scope of corruption etc.

(c) Besides the two above, *Mahakvari* and *Malguzari*—former system prevails in U.P., Orissa and Punjab and the latter in Madhya Pradesh. In case of former, individual payment for his proprietorship in a 'mahal', but in the latter, there are village headmen who were conferred a special status by the foreign rulers.

(IV) PRE-INDEPENDENCE LEGISLATIONS:

The highlights of tenancy legislations—enacted in pre-independence India may be grouped under four main grounds:—

(1) Security of tenure by the Britishers. (e.g. in Bombay, Punjab, Himachal Pradesh and Uttar Pradesh).

(2) Fair rent. Legislations passed partially reduced the exploitation by the landlords in Punjab, Rajasthan and Hyderabad.

(3) Some pieces of legislations offered good opportunities to the tenants to become

land-owners, in the above states, for instance.

(4) Compensation for great permanent improvements of the holdings tilled by tenants. But the results in this respect were not very fruitful due to tenancy problems.

With regard to Government action, Tenancy Laws were passed in various States to fix rents and give security to ryots.

In Bengal, in particular, three distinct types of land interests existed, namely, zemindar, tenure-holder, tenant. Ryots were also classified into occupancy ryots and non-occupancy ryots. Amongst different land laws, Bengal Tenancy Act of 1885 as amended in 1928 and 1938 look into interests of the ryots. It conferred on the ryots of all categories the right of transferring their land without zemindar's consent. The interests of all classes of tenants had also been made heritable. The economic inefficiency and social injustice led the legislative measures to be adopted in various States for abolition of zemindari system.

(V) POST-INDEPENDENCE MEASURES:

In an underdeveloped country like India, where excessive pressure of population is on land and rack-renting is the common characteristic, firm tenancy reforms are essentially necessary to mitigate the toils of the poor Indian farmers. Nature has endowed India with plentiful natural resources. Still it is a paradox that Indians suffer from penury. Is it not then a veritable enigma? In this crucial circumstance and in the reorganisation of Indian agriculture, land reforms undoubtedly offer a good socio-economic base and institutional frame-work for bringing about a planned agricultural revolution which, in turn, creates grounds for rapid industrialisation. Consequently, the famous planners of the country endeavoured most to bring far-reaching changes in the

present defective and faulty methods of agriculture by good pieces of tenancy legislations. Seriousness of the problems of tenants has been recognised on a wider angle in recent years.

(A): The Zemindari Abolition Acts passed in different States in India follow more or less a uniform scheme. Under the Acts, Zemindaries will be acquired by the States on payment of certain rate of compensation in the form of interest-carrying bonds over a period ranging up to forty years. Different State Governments have set out different compensation systems according to the legislations passed by their State Legislative Chambers. In Uttar Pradesh, compensation is based on net assets, whereas in case of Assam, Madhya Pradesh, Bihar and Orissa, compensation is founded on net incomes.

(B) LAND REFORMS DURING FIRST PLAN: In view of the serious problem of Indian agriculture, the formulators of our First Plan state that the "land problem overshadows all other problems in India. The central problem is to change the character of Indian agriculture from subsistence farming to economic farming". The Planning Commission has made important proposals for land reforms, which relate to:—

- (1) Abolition of intermediaries.
- (2) Prescription of upper and lower limit for holdings.
- (3) Development of production and Co-operatives by small and middle owners along with a programme of consolidation of holdings.
- (4) Right of personal cultivation.
- (5) Benefit to land-less workers. Bhoodan Yajna movement by Acharya Vinoba Bhave has also been attempted to mitigate the problem of landless workers.

(6) Encouragement to co-operative farming and co-operative village management.

(7) Central organisation of land-reform by legislative measures.

(C) LAND REFORMS DURING SECOND PLAN: Emphasis was also placed on the agrarian reorganisation programme. During the First Plan, intermediaries were abolished in a number of States, security in land tenure was given and rents were reduced. But progress on transfer of rights of ownership was slow.

Action on the ceiling on holdings during the First Five Year Plan has mainly taken the form of ceiling on future acquisitions. "During the Second Plan, it is proposed, steps should be taken in this direction in each State. The limit proposed is three times the family holding. A family holding, may be considered from two aspects, namely,

- (a) as an operational unit and,
- (b) as an area yielding a certain average income.

Since there are considerable difficulties in determining family holdings, the appointment of a committee of experts has been suggested. Land in excess of the ceiling will be acquired by the State on payment of compensation and distributed to displaced tenants and landless workers. "It is also proposed to apply land management legislation in Selected National Extension and Community Project areas".*

(VI) CASE FOR WEST BENGAL:

The zemindari Abolition Acts passed in various States followed a uniform process.

* Quoted from "our Second Five Year Plan"—published by the Publication Division. Page 41. Government of India, New Delhi.

Payment of Compensation was also rated by each State Government. In West Bengal, particularly the West Bengal Estates Acquisition Act was passed in 1953 for making a radical change in land interests and its proprietors. The main features of the Act are as follows:—

(1) With the elimination of Zemindari system, rights and interests of the landlords will vest in the State.

(2) Intermediaries will be entitled to possess 25 acres of agricultural lands and 20 acres of non-agricultural lands. Uncultivated areas will be acquired by the State.

(3) Fisheries, tea-gardens, and mill-used lands, factories, workshops have been exempted from the Act.

(4) The Act will not include lands held by a corporation, religious or charitable organisation.

(5) Compensation for acquisition of lands has been based on the net incomes of the intermediaries. The higher the income, the lower is the compensation.

(6) Calcutta Municipal area including Tollygunge will not fall within the purview of the Act.

This Act elicited strong public criticism for non-inclusion of any provision for social reform in land. Rate of compensation to be paid to intermediaries also drew caustic protest. However, this Act has been supplemented by the Land Reforms Act, the important points of which are as hereunder:—

(1) The ryot will be the full owner of the land-holding. For the development of agriculture, the holding shall be made heritable and transferable subject to certain restrictions.

(2) A ryot shall hold 25 acres of land holdings as the ceiling limit excluding homestead and fishery.

(3) Government has been empowered to acquire any land in any area on the representation made by persons in that area for consolidation of holdings.

(4) Co-operative farm has been recognised to be formed and shall be assisted by certain concessions.

(5) A "Bargadar" shall be entitled to enjoy 50% of the produce in certain cases and in other cases 60% for the "Bargadar" and 40% for the raiyat.

(6) In the matter of assessment of revenue, consideration will be given to soil-condition, productivity, average yield per acre and market value of the crop-lands.

(7) The State Government has been saddled with the responsibility of redistributing lands of surplus nature to local people for personal cultivation.

(8) The question of fragmentation of land-holdings has not also been lost sight of.

(VII) CONCLUSION:

The tenancy legislations in India so long enacted are very often confronted with varying nature of problems to be implemented. They cannot bring change overnight. They cannot be the panacea for all the economic ills of the Indian farmers, but it is expected that with the efflux of time, they will cure the social and economic maladies and bring about gradual change in the existing wretched condition of our agricultural system. And the neglected section of the people in the agricultural sector will find a new world of prosperity in time to come through their own co-operation and governmental efforts.

Some Dharmasāstras on Judicial Procedure

By

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The regular exposition of the legal system of ancient India is to be first noticed in the Dharmasāstras. The question of judicial procedure occupies a considerable portion of them. This essay endeavours to place a brief outline of it, and in doing so it proposes to deal with the Smritis of Manu, Yājñavalkya, Nārada and Bṛhaspati.

Nārada in his Smṛiti speaks of the four "feet" or modes of decision of judicial proceeding. They are: Dharma (moral law), Vyavahāra (judicial process), Charitra (written document) and Rājāsāna (royal edicts). Bṛhaspati utters the same. To him the modes of decision stand as those according to Dharma, Vyavahāra, Chāritra and Rājājñā. But these terms have differently been interpreted in two different places. A quotation in the Smṛitichandrikā explains Vyavahāra as a decision based on the Śāstras, Chāritra means a decision given in accordance with local usage or with the opinions of merchants and Rājājñā is interpreted as the king's decision in disregard of usage. The other explanation is given in the Viramitrodaya. Here Dharma means the decision given in a case after due deliberation, according to equity. This type of decision occurs again when the defendant admits his charge or his innocence is proved by means of ordeals. When the judgment is passed after the placement and examination of the evidence and again when the defendant tells a lie or makes no answer, it is known as decision by Vyavahāra. Chā-

ritra means a judgment based upon inference or passed according to usage. Rājājñā takes the supreme importance when the evidence is equally balanced or the law books are at variance. Manu and Yājñavalkya are not very specific on this point.

Coming to the question of the successive stages of a judicial trial, the Smṛitis are unanimous and describe them in the following manner: Submission of the claim by the plaintiff, giving of answer by the defendant, placement of evidence before the court and pronouncement of judgment by the court. Bṛhaspati mentions these in his own way, namely, Pūrvapaksha (plaint), uttara (answer), Kriyā (adducing of proof) and Nirṇaya (judgment).

The plaintiff is defined in the Smṛitis as one who approaches the court with his plaint. Yājñavalkya says that the plaint is to contain the particulars relating to the year, the month, the day, the name, the caste, etc. of the parties and these are to be made before the defendant. He further lays down certain rules connected with the plaint. The pleading of cases related to crimes of violence, theft and assault must be made immediately. Such swiftness is not required in other cases. On the eve of a suit sureties are to be placed. Until a particular case is finished, no further claim or counter-charge is to be allowed except in cases of serious offence. A person already under a charge is not to be sued. A plaint,

Nārada says, is allowed to be amended before the answer of the defendant has been filed. In order to look after the defendant so that he cannot abscond himself, Nārada allowed the plaintiff the right to keep the defendant under legal restraint.

The answer is to be written down after the hearing of the plaint. Nārada is a bit categorical on this point. He mentions the different kinds of answer, namely, denial, confession, a special plea and a plea of previous judgment. Following Yājñavalkya he further tells that answer must be given without any delay in cases of theft, crimes of violence and the like. But in the suits related to debt answer is expected not so promptly. In doing so the plaintiff may appoint his agent who must either be a relative or an agent duly appointed.

After the statement of both the parties have been recorded, the evidence has to be presented before the court. Yājñavalkya and Nārada speak of the three kinds of proof, namely, documents, witnesses and possession. Ordeals stand as the fourth kind of proof. It is to be used, says Yājñavalkya, only when the plaintiff is destined to pay a heavy fine or suffer corporal punishment. In cases of high treason and sins of serious type ordeals are to be used even by disregarding the wishes of the other party. But Nārada takes a somewhat different view. He declares that where other kinds of proof are wanting, ordeals are to be taken as a last

alternative. The document, says Yājñavalkya, must contain the details like these: the names of the parties, gotra names, castes, their fathers' names, the year, the month, the day, the witnesses, etc. And on it must be given the signatures of the writer, the debtor and the witnesses. A contract written in one's own hand and not attested by witnesses would stand as valid provided it was not made by force or fraud. In cases of doubts comparison of the different documents written in the party's own hand is allowed. The above description of a document by Yājñavalkya resembles that of Manu. After defining the views of Manu on witness, Nārada makes a reference to its eleven different classes. Yājñavalkya mentions five kinds of ordeals, namely, by balance, by water, by fire, by poison, and by sacred libation. Nārada added two more to these, such as, the rice-ordeal and the ordeal of a hot piece of gold. Brihaspati mentions all these in his Smṛiti.

Examining the evidence placed before it, the court has to perform its final task and give the right judgement. It is the view of many of the Dharmaśāstras that in deciding cases, the prime importance is to be given to the Smṛitis. But usages and reasoning play no minor role. Hence Yājñavalkya declares that where the Smṛitis are in conflict on a particular point, the principles of equity are to be followed. But Dharmaśāstras will prevail when it is in conflict with the Arthaśāstra.



"The vigilant, and not the sleepy, is assisted by the laws,"

Vernacular Press Act

By

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Lord Lytton was then the Governor-General when for the first time the Government put its seal of sanction on invidious distinction between one section of the Indian Press and another, exempting the Anglo-Indian (old style) papers from the operation of a law which militated against the freedom of the press.

Strong Current—the contemplation of gagging the vernacular press had been in the mind of the Government long before Lord Lytton; in 1873, Sir George Campbell, as Lieutenant Governor had expressed himself decidedly of opinion that a much stronger law was required than that which then existed (viz. Act XXV of 1867 and section 124A of the Penal Code, as amended by Act XXVII of 1870).

To prove that the vernacular Press had been printing seditious matters and creating disaffection towards the Government, extracts from different Vernacular papers were culled through 18 months. These were circulated and Lord Lytton's Government obtained the opinions of the local Governments who all with one exception agreed that a special law was needed for the control of the native Press.

Duke of Buckingham—The one exception was Madras—the Duke of Buckingham opposed it; Here is his language—"I hold the Vernacular Press to be a useful indication of the under currents which may be running through the mass of Indian population. But if any serious spirit of disaffection or

hostility is increasing among the people, indications will float to the surface among the Vernacular papers as surely as the dross is thrown to the surface of molten metal. Systematic attempts to excite hostility or sedition, I would prosecute. But for this the present law provides in the Penal Code and to my mind sufficiently and in emergency, should any such arise, there is the same power in the State to restrain the man, who writes treason, as the man who speaks it."

But this solitary opposition could not desist that theatrical personality of Lord Lytton who was always impatient of criticism, in having the Bill passed as quickly as possible.

Lord Salisbury—A telegraphic despatch was addressed to Lord Salisbury, the Minister for India, from India on the 13th of March, 1878 proposing an entire and immediate change in the law relating to the Press of India. On the morning of 14th March, Lord Salisbury's reply affirming and sanctioning the proposal to pass an Act of the kind was despatched from England just only one day after the first official communication. Lord Salisbury had his sanction to this sudden and secret proceeding without the sanction of the Council of India.

Native Papers—The Advocate General favoured the necessity of this Bill as according to him the native papers were guilty under the following heads:—

(1) Seditious libels; malicious and calumnious attacks on the Government, accusing it of robbery, oppression and dishonesty and

imputing to it bad faith, injustice and partiality.

(2) Libels on Government officers.

(3) Contemptuous observations on the administration of Justice, pointing to its alleged impurity and worthlessness.

(4) Libels on the character of Europeans attributing to them falsehood, cruelty and heartlessness.

(5) Libels on Christians and Christian Governments and mischievous tendencies to excite race and religious antipathies.

(6) Suggestions and insinuations which their authors believe fall short of seditious libels by reason of the absence of positive declarations.

The measure was fully explained to the Council by Sir Alexander Arbuthnot, member of the Supreme Council, in a statesman like speech; Sir A. Eden, then supported the Bill on the ground that "the papers published in this country in the English language were written by a class of writers for a class of readers whose education and interests would make them naturally intolerant of sedition; they were written under a sense of responsibility and under a restraint of public opinion which do not and cannot exist in the case of the ordinary native newspapers."

There were sixteen gentlemen by whom the piece of legislation was conceived and brought to maturity; unhappily there was not one of these sixteen gentlemen who had ever the smallest practical knowledge of the working of the free institutions of any country.

The only native who sat in the Council expressly and carefully reserved his judgment. He said, "Yet that some sort of a check should be put on this liberty of the Press I cannot deny; but whether the provisions of the existing law are not sufficient

for the purpose is what I am not in a position to judge."

Main Provision—The main provision of the Bill was the removal of Press prosecutions from the judicial establishments of the country to Executive fold. The established Courts had previously the power to deal with any infringement of Press law but thenceforth in case of Vernacular Press the Executive had got the sole right to decide whether any writing in the Vernacular Press was seditious or not.

The Act contained a provision (Section 51) which enabled the publishers of Vernacular newspapers to withdraw themselves from its restrictive provisions by submitting their proofs to a Government Officer. The Secretary of State, when assenting to the Act, objected to this provision and it was repealed on the 16th October, 1878.

It was thus decided that in case of Vernacular Press, when the Government would decide that any writing was seditious, the Editor, printer or publisher of the Press would be called to execute bonds.

'Soma Prokash'—The first victim of the law was the 'Soma Prokash' and a bond was demanded from its printer. The printer executed the bond but stopped the issue of the paper.

Gladstone's opinion—On July 23, 1878, Gladstone made a speech in the House of Commons regarding the Vernacular Press Act; in the speech he opined about the extracts on whose basis the Act was made—"I find a great deal that is silly and frivolous along with a good deal that is permissible and a great deal that is positively useful."

Thus when there were adequate laws to deal with seditious and preaching of disaffections in Vernacular Press still the Bill

was enacted. The Bill removed the Vernacular Press prosecutions from the judicial establishments of the country in order that they might be dealt with as matters of Executive discretion. This shows that the authority was adamant to choke the voice of the Vernacular Press so as to keep the mass politically backward.

Smith's remark—But V. Smith, the his-

torian has tried to justify Lord Lytton's action on the ground that many indigenous newspapers were pro-Russian and anti-British and to safeguard the British rule in India it was necessary.

When Gladstone came into power he sent Ripon with the express instructions to repeal the Act which was enacted on 19th January, 1882.



*"Move up, Fatty", shouted school-boy in the railway carriage.
"You ought to know that, according to Act of Parliament, a
passenger in a railway carriage is only allowed eighteen inches of
space."*

Art of Cross-Examination

By

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Lawyers have been described by Jonathan Swift, the well-known satirist, as "a society of men bred from their youth in the art of proving by words, that black is white and white is black, according as they are paid." On the other hand, persons of notable eminence like Dr. Jhonson and Basil Montagu have spoken highly of this profession. But the fact remains, after all that has been said for or against it, legal profession has attracted to its fold, brilliant men of wide culture and education since the dawn of civilisation. But the prizes in the profession are few and failures many. In order to escape the danger of knocking heads against the stone-walls of law courts, the persons taking up this profession should be well equipped and armoured for the struggle. The art of examination and handling of witnesses in a legal tussle constitute the most essential equipment for a successful legal practitioner.

Section 137 of the Indian Evidence Act provides that "the examination of a witness by the adverse party shall be called his cross-examination." It can be said, and said with a great deal of truth behind it, that properly conducted cross-examination is one of the most efficacious means of discovering truth and exposing falsehood. This art is of importance beyond measure specially in criminal cases and for a good defence. But even then it should not be done in a reckless manner. It is like a double-edged weapon and often injures him who

employs it as well as him at whom it is aimed.

Then, what is the secret of the art of cross-examination? Lord Brampton is said to have answered it in one word "patience". The faculty of interrogating witnesses effectively is one which requires a careful study and a considerable knowledge of human nature and psychology. Such informations about the nature of a witness is to be gathered from careful and close observation of his behaviour in the witness box when he is being examined-in-chief. Witnesses are to be handled according to their nature. Timid witnesses must be encouraged and the talkative witnesses repressed. "Modulate your voice as circumstances may direct, inspire the fearful and repress the bold." (David Paul Brown).

The direct attack is quite another method. It succeeds only in the hands of commanding personalities like C. R. Das, Sir R. B. Ghosh and the persons of their caliber. But even then this practice yields no favourable result unless they are sure of their grounds. Every man has his own style of cross-examination, but an unruffled temper and courtesy to both court and witness is needed most. As Sir Walter Schwable (former Chief-Justice of Madras) remarked—"cultivate a pleasant manner and get on as friendly terms as possible with the witness." It is more effective to behave with a witness as politely as mildly and as friend-

ly as practicable than to attack him directly. Direct and puzzling questions from the very beginning may drive the witness to a hostile attitude and thus deprive the lawyer of the chance of getting facts favourable to his client which friendliness alone can secure. Similarly, without a definite plan and without an object to launch into cross-examination is a dangerous process and it may go

against the cause of the cross-examiner's client.

To conclude, a cross-examiner should be "mild with mild, shrewd with crafty, confiding with the honest, merciful to the young, fierce to the fearful, a thunderbolt to the liar, but should never be unmindful of his own dignity."



"If you 're strong on the facts and weak on the law, discuss the facts. If you 're strong on the law and weak on the facts, discuss the law."

The Utility and the Futility of the Directive Principles in our Constitution

By

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The German poet Goethe in his 'Faust' has complained against the 'malady' of obsolete law in society—against the problem of slow response of legal bodies and customs to the needs of a progressive society. But this is a view of law in its dynamic sense. A static view of law becomes necessary when stability becomes a vital issue—where the problem of overgrowth of society points to the direction of the need of a social insurance policy in the form of law. The Directive Principles of State Policy as contained in the Part IV of the Indian Constitution (Arts. 36-51) represent such a built-in social insurance policy in our constitutional document.

These Directives lay down the lines on which the State of India should work under this constitution. Their contents embody: (i) certain ideals, particularly economic, which the framers of this constitution wish that the state should strive for (ii) certain directions to the Legislature and the Executive to show in what manner they should exercise their legislative and executive powers (iii) certain rights of citizens, which shall not be enforceable by the courts like the 'Fundamental Rights' but which the state shall nevertheless aim at securing, by regulation of its legislative and administrative policy. Thus they represent an amalgam of utilitarian and socialistic thought—blended nicely to serve the purpose of a welfare state. They derive their inspiration from the similar directives in the Spanish

and the Irish constitutions. Though these Directives are not cognisable by the courts and if the government of the day fails to carry out these objects no court can make the government ensure them, yet these principles have been declared to be 'fundamental' in the governance of the country. These principles are thus only directives and not meant to be justiciable. It is not a court but public opinion that can enforce them. As Hume has pointed out, ultimately all governments depend upon public opinion.

Writers on constitutional law have differed as to the utility and expediency of the inclusion of such principles in a constitutional instrument. The Federalist ridiculed the aphorisms and observed that they should find a better place in a treatise on ethics than in a constitutional document. Wynes referring to the modern tendency to increase the number of matters sought to be protected, remarks that it is a striking testimony to the weakness of the popular governments. K. C. Wheare has described them as "a manifesto of aims and aspirations" and Ivor Jennings ironically remarks that they have indeed succeeded in increasing the rigidity of the Indian constitution—the vast field of legal details will make friction over constitutional validity a routine affair.

But the working of the constitution has demonstrated that these principles are not mere surpsensage. First of all, though courts cannot declare a law to be invalid on the ground that it contravenes a Directive Prin-

principle, nevertheless the constitutional validity of many social legislations has been maintained with reference to the Directives. It is true that they have to conform to and run as subsidiary to the chapter of 'Fundamental Rights'; yet the restrictions which are imposed on the exercise of fundamental rights for the purpose of securing the objectives enjoined by any of the Directives may be regarded as 'reasonable restrictions' within the meaning of clauses 2 to 6 of the Art. 14. Because what the state is required to do by the constitution itself cannot be regarded as unreasonable.

Secondly, the constitution itself has been amended at least on two occasions (The 1st and the 4th Amendments) to modify those fundamental rights by reason of whose existence the State was experiencing difficulty in effecting agrarian and economic reforms which are directed by the Directive contained in the Article 39, e.g. "that the ownership and control of the community are so distributed as best to subserve the common good." Thus the Directives have to this extent given a mighty propulsion to our constitution towards "the socialistic pattern of society" away from the Anglo-American tradition of individualism and have removed the oligarchic bias of our constitution to a great extent.

As to the binding force of the Directive Principles, Dr. Ambedkar, the Chairman of the Drafting Committee, observed, "Nor am I prepared to concede that they are useless because they have no binding force in law. The Directive Principles are like the Instruments of Instructions issued to the governors of the colonies and to those of India by the British Government under the 1935 Act. 'Directive Principles' form merely another name for Instruments of Instructions. The only difference is that they are instructions to the legislature and the exe-

cutive." From this point of view they may be welcomed. Wherever there is a grant of power in general terms of peace, order and good government, it is necessary that it should be accompanied by instructions creating its exercise. The principles become justifiable for another reason. They provide some moral precepts for the authorities of the State-function as the headlight of a motor car in the dark and they may have some educative value at the formative stage of the constitution which is only nine years old.

It is in the moral side of its binding force that the importance of these Directives becomes crystal-clear. The Indian constitution provides a machinery for the government of the country. The Directives constitute the national objectives, the national conscience and are likely to improve silt conditions for safe constitutional navigation. These principles provide an element of permanency in a democracy which is a showcase of alternative governments run by different political parties. By enthroning the ideals of economic and social democracy they will pull back the revolutionaries and push forward the reactionaries. They will serve as a perpetual reminder of the aims and objectives of the constitution. It is a great discovery of political laboratory to find out a broad agreement on fundamentals to bind down successive alternative governments. Theoretically it is not possible to give the Directives the status of justiciable fundamental rights. The reason has been pointed out by Professor K. T. Shah, they are like a cheque on a bank payable when able—only if the resources of the bank permit. Having regard to the modern trend of democratic governments, which is to shift the emphasis from individual liberty to the maintenance of a welfare state on the collective principle and to the innate rashness and tyranny of shortlived legislative major-

rities it is perhaps well that these aims and principles are prominently set forth in the body of the constitution. Viewed in this long term sense, from the juristic point of view, they may become a great bulwark of individual liberty, with prestige no less shining than that of the 'Fundamental Rights' in the future working of the constitution. They may be comparatively barren in the sense of immediate gain, but they have rich future potentiality which is yet to be tapped. Any ruling party cannot disregard them; because though not enforceable by courts, they are still indirectly enforceable by a much greater tribunal, the tribunal of public opinion during the election time. The theory of Directive Principles may be regarded as a wider application of the doctrine of estoppel in constitutional law. By an elastic interpretation it may be viewed as a theory estopping the successive governments in power from dishonouring to the prejudice of the general electorate the sacred terms of policy of governance of the country set forth in a previous declaration known as the constitution which is the fundamental law of the law.

But at the same time we must also be careful about the futility of these principles. Unless these principles are kept in view by the Legislature in the making of laws, by the Executive in applying them and by the Judiciary in interpreting them, they will remain as pious superfluities in the cold storage—because most of them are too wellknown to be incorporated formally in the constitution. By making an odd and unscientific mixture of modern and old concepts, important and unimportant issues, they confuse new blood with old blood. They present us with a queer amalgam of the 16th century absolutism, the 19th century liberalism as expounded by Dicey and half-hearted policy of socialism. Some times the precepts are delightfully vague in their con-

ception. It is difficult to discover any organic and systematic programme for economic and social reconstruction out of them. It is not with complete injustice that they have been described as the "rump of the Drafting Committee," as "the veritable dustbin of sentiments sufficiently resilient to permit any individual to ride his hobby-horse into it."

A school of opinion on the other hand will favour the policy of refusal by the President or by a governor to give his assent to a bill on the grounds of direct contravention of any of the Directives in the constitution. But this is a dangerous doctrine which may undermine 'parliamentary democracy' by inviting the possibility of conflict between the 'ceremonial head' and the 'ministerial executive'. Thus the constructive value of these principles—and their resourcefulness are also open to question. As they cannot be translated into practice save by legislation, in the absence of proper legislation the individual and the state cannot go beyond the existing law to implement a certain directive. This dependence of the Directives upon future legislation—their parasitic nature for the sake of proper fruition is sufficient to diminish their face value. The futility of them becomes apparent when the electorate becomes free only at the election time after every five-year term as to influence legislative trends to its own benefit. The Article 37 only makes it a duty of the state to apply these principles in legislative output—it does not make the rule obligatory or compulsory and the directives in themselves do not confer any legislative power upon the Legislature. In themselves they are evasive on vital social problems. Moreover, as I have pointed out, they add to the rigidity and complexity of our constitution—making inevitable the battles for constitutional principles and duels for constitutional validities.

Recognition of States—a Problem

By

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To the students of international Law the question of recognition of state is a baffling problem, and requires a careful solution and to Starke, "the subject of recognition is one of the most difficult branches of International Law not merely, from the point of view of exposition of principles but also intrinsically by reason of many difficult questions, which continually arise in practice", and the problem of the recognition of States has been the most discussed matters in the field of recognition. The question of recognition arises in reality, in very vicissitude of state life.

It is really an enigma, a puzzle, when and how a state will be recognised as state. There is a broad divergence of opinion among the International Jurists whether recognition is declaratory or constitutive i.e., whether a state exists prior to recognition or whether it is brought into being by the act of recognition.

Generally, recognition of a state is the act by which another State acknowledges that the political entity recognised, possesses the attributes of statehood. The International Jurists broadly and emphatically asserts that the question of recognising new state and government should not be taken together. The problem of recognition of new states is practically different from the question of the recognition of new Government.

The recognition of new states involve the question of admitting new political group

inside international community. It has already been accepted as a fundamental principle of International law that the people has the right to choose its own form of government. Moreover, when the changes take place in the government of a state in accordance with the constitutional procedure there is no question of the recognition of new governmental officials by other states. Here the succession is direct and automatic.

THE RIVAL DOCTRINES OF RECOGNITION

The question of recognition of states has always been dominated by the controversy between two schools of thoughts, namely the declaratory and constitutive schools.

The principle of declaratory school as stated by Prof. Oppenheim is that "A state is and becomes an International person through recognition only and exclusively. The exponent of this principle include Tripet, List, Lawrence, Prof. Kelsen, Prof. Lauterpacht and others.

The other theory, i.e. constitutive theory, as stated by Hall, is as follows, "State being the person governed by International Law Committees are subjected to law from the moment only at which they acquire the modes of a state".

In other words, whenever a state in fact exists it is at once subject to International Law independently of the wills of or actions of other states. But the difficulty arises with regard to constitutive theory, as

state does not exist and is not regarded as International person, though some think that it exists from the point of view of constitutional law, but not juridically.

THE MECHANISM OF RECOGNITION:

Granting for the sake of argument that recognition is necessary for the creation of the international personality of the state, it still remains for the adherents of the constitutive theory to give a coherent and logical explanation of the working mechanism of recognition.

Prof. Lauterpacht recognises the weakness of the constitutive theory, on the ground, that it is the imperfection of the International organization which is the case of the divergent timing of recognition, secondly that the difficulty of attaining uniformity in the appreciation of state-existence is common both to constitutive and the declaratory theories.

The alternative doctrine which has been vigorously put forward by Lauterpacht is to regard recognition as a unilateral act of the recognising state. He also says that recognition are those principles of autonomy and equality apply only in the relation between states already in existence, and does not leave any permanent stigma of subordination on the new state. For recognition once given creates an obligation which like any other international obligation owes its continued binding force to international law.

On the other hand, we shall have to determine whether the question of recognition involves legal or political considerations. The answer is that it is both. Again, the question arises whether recognition is conditional or not. It is rather foolish to argue that recognition is conditional. By conditional recognition we mean, recognition will be given only on certain conditions, i.e. state seeking recognition must be a peace-loving state.

Prof. Baty strongly criticises the concept of conditional recognition and regards recognition either it is a fact or not. The very essence of recognition is that the recognising state thereby declares that it has satisfied itself that the recognising authority possesses the distinguishing marks of a state. This is like telling pupil that her sum is right if she will promise to be a good girl. These are in fact, the general principles of the doctrine of recognition of states in theory. We shall now discuss at some lengths the practical application of the doctrine of recognition of states.

THE QUESTION OF CHINESE RECOGNITION.

The question of Chinese recognition though, is not primarily involved with the study of the law of recognition, still no discussion of that question can be divorced from the subjects of recognition of states and government.

It is one of the most controversial problems that United Nations has ever faced and remained unsolved yet. The problem of Chinese recognition is by itself unique and chequered, and at once captivates the attention of all, specially, the politicians and diplomats of the World. It is unique because it combines number of special features and peculiar because it does not even directly concern with the question of recognition of states. It is rather a question, "Which Chinese" is entitled to represent as a state in an international organisation of which the state—quastate is already a member. So the basic question that logically comes to one's mind who does in fact represent China.

With the emergence of China as a unified National power under the communist leadership draws the biggest headache of the United Nations. The main reasons for these anomalous and dangerous situation is the intensity of cold war and bitterness of anta-

gonism between communist and non-communist Worlds. It is really a tragedy that United Nations is not powerful enough to solve such a vital issue and it is really unthinkable how the government of Chiang Kaisheck (Kuo-min-tang Government) who only controls the Islands of Formosa, only a part of China, represents China in the United Nations. There are two major aspects of this problem—the recognition of the Communist Government of China by other states individually, and the admission of the Communist Government of China as the legitimate representative of one of the member states of the United Nations collectively.

It is generally recognized that normally by far the most important test for the recognition of new government of an already existing state is effectiveness i.e., ability of the new government to control the territory and population of the state which it claims to represent and its consequent ability to fulfill international obligations of the states. But there is no doubt that the effective government of China today with the possible exception of Island of Formosa is the communist government of China which completely demolished and expelled the Chiang-Kaisheck Government and since then very successfully and effectively controlling the national state.

But according to the Stimson doctrine there is a duty not to recognise a new state or other territorial change established, not primarily by internal action but by the aggression of another state in violation of its International Obligations.

The Nationalist Government has sought to invoke the Stimson doctrine to prevent recognition of the Communist government as the government of China asserting that the latter's success was due to aggression by the Soviet Union in violation of its treaties

with China and of the United Nations Charter. The representatives of the Nationalist government of China introduced a resolution in the General Assembly on November, 26, 1949, declaring that the Soviet Union had violated the United Nation's charter by assisting Chinese Communists. The General Assembly refused to accept this resolution calling upon the members of the United Nations to respect the independence of China, and came to the conclusion that Stimson doctrine was not applicable with regard to China. The acquisition of control by the Communist Government was in its opinion the manifestations of self-determination of the Chinese people rather than the manifestation of aggression by the Soviet Union. Even if it were assumed that the illegal Soviet assistance to the Communist Government had been the decisive factor of the Chinese success, still it remains a question as to what extent Stimson doctrine could be applicable to China as the Government has established itself with the people's consent.

Again that the Stimson doctrine forbids recognition of territorial change whether affected by the defacto establishment of new states like Manchuku or by annexation of Ethiopia by Italy and of Austria by Germany when the change has resulted from external aggression without substantial support of the inhabitants of the area. Again prior to the outbreak of hostilities in Korea the communist government was considered to be the general defacto government of China. Many states, non-communist as well as communist recognised China as the legitimate defacto government. Even Prof. Lauterpacht in a letter to London Times of January, 6, 1950 set forth the principles of International Law suggesting that there is an obligation to recognise the Chinese Government.

In retrospect, it seems unfortunate that

the recognition was not accorded at that time. And as a result of which Soviet Government got an upperhand and integrated China economically and politically with her. All the more, Americans' failure to recognise China gave the Soviet Union an opportunity to prolong the situation, first by withdrawing its representation from United Nation Organisation and subsequently by stimulating aggression in Korea. This made it more difficult for the United Nations to recognise the communist government of China. Moreover, the Korean incidents in June, 1950 did, however, induce President Truman, as a precautionary measure to order the Seventh Fleet to prevent hostilities either by the communist or the Nationalist Chinese government. This looked toward recognition of two Chinas. Again the visit of the Secretary General of the United Nations to Peking in January, 1955 in pursuance of a General Assembly resolution to discuss the release of American

and other personnel of the United Nations command in Korea held by the Peking Government and the invitation extended to that government on 31st January, 1955 by Secretary General in pursuance of Security Council resolution to discuss in the Security Council a cease-fire with the states of Formosa looked toward recognition of the Peking Government by the U.N.

Judged from the perspective of Veto power often exercised by any of the Big Five conditional recognition seems to be inhuman illogical and abnormal. The U.N. Charter will only be respected with due regard if the entire population of the world come within its perview. It shall not impose any stigma which dissociate a part of the world and a huge population from the United Nations. In that case the purpose of U.N. will be thwarted, its actions will be paralyzed and its character will not be representative in the strictest sense of the term.

"It is trite law that the thought of man is not triable, for even the devil does not know what the thought of man is."

Some Aspects of 'Income'

By

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The word "income" has got some special significance to every student of income-tax law. This word can be explained from various aspects. In this article an attempt has been made to analyse the word from three aspects namely, (a) Definition of income, (b) Application of income, (c) Diver-sion of income.

A. Definition of Income:-

The Income Tax Act, 1922 has vaguely defined "income". The "income" as defined in Sec.2 (6 c) "includes."

- (i) dividend;
- (ii) the value of any perquisite or profit in lieu of salary taxable under Sec.7,
- (iii) the value of any benefit or per-quisite, whether convertible into money or not, obtained from a company either by a director or by any other person, who has a sub-stantial interest in the company (that is to say, who is concerned in the management of the business of the company, being the beneficial own-er of shares, not being shares en-titled to a fixed rate of dividend whe-ther with or without a right to parti-cipate in profits, carrying not less than twenty per cent of the voting power) and any sum paid by any such company in respect of any obligation which but for such pay-

ment would have been payable by the director or other person afore-said;

- (iv) any sum deemed to be profits under the second proviso to clause (vii) of sub-section (2) of Section 10, and any sum deemed to be profits and gains under Sub-section (2A) of that Section or under Sub-section 5 of Section 12;
- (v) any sum deemed to be profits and gains of business, profession or vo-cation under Sub-section (5A) of Section 10;
- (vi) any capital gain chargeable under Section 12B;
- (vii) the profits and gains of any business of insurance carried on by a mu-tual insurance association or by a co-operative society computed in ac-cordance with rule 9 in the Schedule."

It is held in good many cases like *Rex v. B. C. Fir & Cedar Lumber Co.* (1932) A. C. 441, 448 (P. C.); *Dieworth v. Comr. of Stamps* (1899 A. C. 99-106); *Tennant v. Smith* (1892 A. C. 150, 164 H.L.) that it is a mistake to think that only the items of the interpretation clause can properly be called "income". We shall also consider the natu-ral meaning of the word income. In three leading Indian income-tax cases, we find an attempt by the Privy Council to interpret the word "income" in its natural import.

The first one is the case of *C. I. T. v. Shaw Wallace & Co* (59 I. A. 206, A. I. R. 1932 P. C. 138, I. L. R. 59 Cal. 1343, 6 I. T. C. 178) in which Sir George Lowndes defined "income" as follows:-

"Income..... in this Act connotes a periodical monetary return 'coming in' with some sort of regularity or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. Thus income has been likened pictorially to the fruit of a tree, or the crop of a field. It is essentially the produce of something which is often loosely spoken of as 'capital'. But 'capital', though possibly the source in the case of income from securities, is in most cases hardly more than an element in the process of production."

The second one is the case of *Gopal Saran Narain Singh v. C. I. T.* (1935 I. T. R. 237, 242). Here Lord Russel of Killowen besides following the definition of Sir George Lowndes added that "Anything which can properly be described as income, is taxable under the Act unless expressly exempted."

The third one is the case of *Kamakshya Narain Singh v. C. I. T.* (1943 I. T. R. 513, 521, 522, 523). Here Lord Wright besides following the definitions given by Sir George Lowndes and Lord Russel observed "Income, it is true, is a word difficult and perhaps impossible to define in any precise general formula. It is a word of the broadest connotation.... Sir George Lowndes speaks of "income" being likened pictorially to the fruit of a tree or the crop of a field. But it is clear that such picturesque similes cannot be used to limit the true character of income.... Income is not necessarily the recurrent return from a definite source, though it is generally of that character. In-

come again may consist of a series of separate receipts, as it generally does in the case of professional earnings. The multiplicity of forms which 'income' may assume is beyond enumeration."

From the practical point of view, if not theoretical Lord Russel's definition is perhaps the best. In some subsequent cases like *Rani Amrit Kunwar v. C. I. T.* (1946 I. T. R. 561, 570 (F. B.)) *Kedar Narain Singh v. C. I. T.* (1938 I. T. R. 157, 161), we find this definition is followed.

Now is there any difference between the terms "Income", "Profits", "Gains"? "Income" and "Profits", these two words are used synonymously, but strictly speaking, there is a bit difference between the two. "Income" is only concerned with, what comes in but "Profit" is the surplus of receipts over expenditure, necessary to earn them. The word "Gains" is an amplification of the word "Profits", in the sense that, while profit is for the benefit of an individual or individuals, gain is what is gained, whether for the benefit of an individual or a community. So the relation between these words is so thin that it is very difficult to distinguish one from the other.

B. *Application of Income*

A man can apply or destinate this income, profit or gain in any way he may like, unless and until he is expressly prohibited by the laws of that country in which he resides. The income-tax authorities are not concerned with that. Such income, profit or gain is liable to income-tax. This is what Lord Macmillan observed in the case *Pondicherry Rly. Co. Ltd. v. C. I. T.* (5 I. T. C. 363, 370). Lord Macmillan observed "A payment out of profits and conditional on profits being earned cannot accurately be described as a payment made to earn profits. It assumes that profits have first come into existence. But profits on their coming into

existence attract tax at that point and the Revenue is not concerned with the subsequent application of the profits". We find in Sec. 16(1) (c) of the Income-Tax Act the embodiment of this principle. Sec. 16(1) (c) of the Income-Tax Act reads as follows "All income arising to any person by virtue of a settlement or disposition whether revocable or not, and whether effected before or after the commencement of the Indian Income-Tax (Amendment) Act 1939 (VII of 1939), from assets remaining the property of the settlor or disponer, shall be deemed to be income of the settlor or disponer, and all income arising to any person by virtue of a revocable transfer of assets shall be deemed to be income of the transferor."

C. *Diversion of Income*

But the provision in Sec. 9(1) (iv) sounds a different note; where in the shape of allowance, what is provided can properly be called a case of diversion of income or not income in the hands of the assessee. Sec. 9 of the Income-Tax Act reads as follows inter alia "The tax shall be payable by an assessee under the head "Income from property" in respect of the bona fide annual value of property consisting of any buildings or lands appurtenant there to of which he is the owner, other than such portions of such property as he may occupy for the purposes of any business, profession or vocation carried on by him the profits of which are assessable to tax, subject to the following allowances namely:—..... where the property is subject to a mortgage or other capital charge, the amount of any interest on such mortgage or charge; where the property is subject to an annual charge not being a capital charge, the amount of such charge; where the property is subject to a ground rent, the amount of such ground rent; and where the pro-

perty has been acquired, constructed, repaired, renewed or reconstructed with borrowed capital, the amount of any interest payable on such capital". For example, where there is an obligatory charge upon some property, the whole income from that property cannot be called as income in the hands of the person receiving it. But it is proper to say that a portion of the income, which that person is bound to pay out of legal obligation is diverted to that extent. It means that portion of income is not coming to that person. That person is only acting as a conduit to pass that income. This is best explained in the case *Bejoy Singh Dudhuria v. C. I. T.* (1933 I. T. R. 135). In this case A was bound to pay B a fixed monthly sum arising out of a legal decree which also declared this sum as a charge on the ancestral estate of A which he was enjoying. The question arose whether this payment can be called as an application of income or diversion of income. If this is a case of diversion of income, this payment should be deducted from the income of A, because it is not his income at all. The Privy Council held that the sums paid by A were not income of A at all. In this case Lord Macmillan observed "In the present case the decree of the Court by charging the appellant's whole resources with a specific payment to his step-mother has to that extent diverted his income from him and has directed it to his step-mother; to that extent what he receives for her is not his income. It is not a case of the application by the appellant of part of his income in a particular way, it is rather the allocation of a sum out of his revenue before it becomes income in his hands."

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Utility of Study of Roman Law in the Modern Perspective

By.

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Of late, the Calcutta University has changed the curriculum for the LL.B. examination and students are now spared the pains of committing to memory certain topics belonging to the classical school which have little bearing on the practical application of law. Therefore, utility of the study of Roman Law in the modern perspective very often agitates the mind of the newcomers. The feelings of an uninformed person on this controversial matter are set forth below.

It is true that, for the purpose of proper appreciation of Roman Law, the reader has to traverse through the history of about twenty centuries ago and to put himself in the shoes of a Roman citizen governed by the patriarchal system of society—a society testing the old precepts and conventions of a primarily agrarian and backward society with the needs of an expanding political and economic system and evolving new principles based on reasoning. The renowned author Prof. Hunter in his prescribed textbook, "Introduction to Roman Law" is very careful in drawing attention of his readers to the various aspects of Roman ingenuousness and practical bend of thinking.

While going through the law of persons, students may not find much interest in the so-called rights and obligations of a slave and his master or even in the different forms of legal manumission of a slave, because

slavery has lost its existence as a political and social institution. But can it be vouchsafed that the study of principles governing this peculiar form of human relationship is of no assistance to them when they are confronted with comparable forms of personal dominion of one man over another or others, even if in a more liberalised form and when political and social deprivation of a particular section of the community has not been completely done away with even in the most advanced countries of the modern world? It is true that the Roman slave did not enjoy the so-called "ex Jure Quiritum" or even the right to marry, but the modern society is not yet free from the fetters on individual freedom and even in the most advanced countries, restrictions are imposed on the coloured people in acquisition of private immovable property and access to places of public residence or public recreation is refused to such persons. Although, India has abolished untouchability as a legal institution, our country is not yet free from the malady of this old established practice, particularly in the rural area. Again, we read in newspapers almost every day decisions of law courts issuing new ruling on labour relationships, which is purely an Western conception. It may be said for the sake of argument that these matters fall within the scope of procedural laws, but we cannot forget for a single moment that the

rulings in each particular sphere cannot be divorced from the fundamental principles of justice and sound reasoning and we are indebted to the Romans for evolving these principles to a great extent. In this connection it is pointed out that the progress in Roman Law in treating atrocities on a slave, first by an outsider and then by the master himself, is highly interesting as well as instructive.

Apart from this, study of governing principles of personal relationship of the other component units of the Roman family is highly instructive and is applicable in many respects even in the existing circumstances. Of course, the study of different forms of authorised marriage etc. may not be much relished; or even the "locus standi" of the Paterfamilias may be looked with abhorrence by the exponents of freedom and autonomy of the weaker sex. The genius of the great jurist Justinian in removing the legal bar on a Roman citizen in marrying persons who could not be treated to have pure blood of a Roman citizen, the rules of legitimisation issued by him and other jurists cannot but be appreciated. With one stroke of pen he boldly discards the old and outdated laws and enunciates new rules to meet the changed circumstances of a highly developed imperialist state. Again, liberalisation of law in respect of separate private property in the shape of peculium by sons etc., which became absolutely necessary to provide incentive to joining the army and making its expeditions successful, establishes the remarkable adaptability of the Roman jurists. Without going into merits or demerits of such rules from the moral or ethical standpoint it can be pointed out that Romans did not forget that law is to serve the greater needs of the community and is not to remain confined into the code books of the old school. It is, therefore, stated that law is progressive. The majority com-

munity of India would certainly be benefitted if they study and appreciate properly how the question of doing justice won over the necessity of observance of strict, old and conventional forms, in the Roman legal system. To quote instances of the highly imaginative pronouncements of Justinian and other jurists, attention of the readers is drawn to the enactments abolishing "LEX AELIA SENTIA" "Les Fufia Caninia" or Donatio Propter Nuptios.

The concept of "Sui Juris", or, to put it more precisely, the study of the rights and obligations of a minor vis-a-vis those of a tutor and of a curator are of immense practical value even in the existing circumstances. We owe our idea of putting limitations on the rights etc. of a minor as well as of safeguarding his interests by finding out various provisions for making his obligatory agreements legally valid, to the Romans. With the growth of large scale industry and commerce legal principles governing validity of dealings of a minor have undergone vast changes and courts of law are still evolving new rules whenever they are faced with new peculiarities in facts and circumstances, but such deductions have to satisfy the prime necessity of doing justice and maintaining law and order in the community at large. Romans wedded their legal system to the above two objectives and must be credited for inventing a highly useful and scientific system and students would be benefitted if a comparison be made with the position of a modern guardian and trustee, while studying these rules.

The law of ownership does not give us a different picture. Even if we ignore the various formal procedures like "Res Nec Mancipi", "Res Mancipi", "Traditio" (together with the need of a Justa Causa Traditionis) and certain other legal rules, we would be highly ungrateful if we deny our indebtedness to the Romans for enun-

ciating the concept of ownership, the modes of acquisition of ownership and extinction of the same. In this sphere also the story of Roman law is ornamented with the imaginative and creative outlook as well as practical insight of the great Roman jurist Justinian who conferred Bonitarian ownership on bonafide possessors, though failing to establish *Ex Jure Quiritum*. Of course, it cannot be denied that the issue is so very complicated that all disputes and controversies on this issue has not been set at rest and two rival schools of theoreticians led by Savigny and Jherring have been formed in a much later stage. But the utility of this enactment to meet the needs of Roman society cannot be denied, although we may shut our eyes from the inferences made by the two schools. Again, the principles of acquisition of servitude, emphyteusis, *Jura In Re Aliena* are followed to a great extent even now-a-days. Students may find it difficult to be familiar with terms like *Specificacio*, *Confusio*, *Commixtio*, *Percepti*, *Usus*, *Habitatio*, *Jura Rusticorum*, *Praediorum*, *Jura Urbanorum*, *Praediorum*, *Jus Pascendi*, *Jus Ferendi*, *Hypotheca*, *Actio Serviana*, *Accesio*, etc., but when the principles behind these are grasped, there can be only opinion that the Romans had imagination and discovered principles which are more or less true today. For deciding disputes regarding accession or exhaustion of land by way of alluvion and dilluvion, we are still guided by the principles laid down by the Romans.

It would, of course, be difficult to understand the principles of contractual obligation evolved by the Romans if we shut our eyes from the peculiar socio-economic and political circumstances prevailing in those good old days. Quick and extensive growth of commerce and economic exchange with the building up of the Empire as a result of successful expeditions, made it incumbent upon the Roman jurists to evolve a scientific

and workable system for recording such transactions and enforcement of obligations arising therefrom which, often, stretched beyond the limits of a particular country. Moreover, the system introduced had to suit the peculiarities in the Roman conception of legal title as well as that of other races. Romans deserve credit—in contrast to the imperial expeditioners in other Western countries as well as in the Orient—in that they divorced their administrative machinery, particularly administration of justice, from the influence of religion to a great extent and became successful in tying persons residing in different regions and following different religious faiths. The disorderly growth and conflicting interests of different states and principalities brought under the suzerainty of the Roman Empire also explain the peculiarity of treating parties to contract as hostages, who were to be freed from fetters by “*Solutio*”, or failing, face the risk of physical punishment.

Students should not feel themselves confused by the use of the term “Law of Obligations” as the title of the chapter and should try to grasp the fundamental principles enunciated keeping in view the peculiar circumstances of Rome. While going through these principles, the modern reader is struck with astonishment at how the Romans could reconcile their old and extremely formal concept of legal title (viz. *Ex Jure Quiritum*) which, in the beginning, had been confined to persons of pure Roman blood and citizenship, with the needs of inter-continental and international trade and at the same time maintain order, peace and progress. In the words of Prof. Hunter, there were “snares and pitfalls”, but the Romans were not lacking in finding out solutions. Here-in lies the explanation to the mystery of conferring enforceability upon certain contracts which involved mere delivery of things and of other contracts made

gratuitously (i.e., without any valid consideration in the English sense). The adaptability of Roman Law did not stop here and, therefore, sweeping changes were brought about in the conception of legally valid title by extension of Roman citizenship at the time of Caracalla.

Similarly, it was a problem how to meet the machinations of indiscreet masters, who, with a view to deceive creditors or to avoid liability in case of loss in business beyond the sum contributed by them personally, concealed the real ownership of the business organisation under the garb of the business being run on in the name of the slave, because Roman law permitted a slave to use his personal accumulations in the shape of "Peculium" in any manner he liked. Formalism could not stand in the way of substantial justice and relief was granted by the intervention of the Praetor and by bringing in action in the form of 'actio contributoria'. Again, denial of the right of agency and of power to enter into bilateral agreement with outsiders, to slaves and sons under the Roman *Paterfamilias* had to be amended making such persons liable by the special procedure known as 'quasi institoria', although normally such persons had no *locus standi* and could neither sue nor be sued upon and were excluded from the operation of the law of agency. Attention of the readers is drawn to the famous Roman maxim, "Our slaves can better our conditions, but cannot make it worse". Absence of monetary consideration, existence of a bilateral agreement, and a 'justa causa traditionis' goes to the root of the Roman law of contract.

Contribution of Romans to the principles of contractual obligations may briefly be stated to be the following:—

- (i) Creation of a right in *personem* in contrast to the right in *rem*,

- (ii) Bilateral agreement,
- (iii) Consideration, though not monetary, to be legal,
- (iv) Vitiating of contract by the exercise of fraud, force, duress, illegality or impossibility of performance etc.,
- (v) Validity of contract depending on legal capacity of parties,
- (vi) Modes of acquisition of rights and obligations and extinction of the same,
- (vii) Difference between enforceable pact and *nudum pactum* (of course, English concept of valid consideration did not come into the picture),
- (viii) Quasi-contract,
- (ix) Opening of ledger accounts in favour of the debtor in the books of the creditor,
- (x) Novation.

It cannot be denied that there are certain differences in details between Roman and English theoreticians of the law of contractual and allied obligations, namely, in the matter of classification of contract, of basic conditions for a valid contract for sale (*emptio venditio*), agency, hire (*locatio conductio*), partnership (*Societas*) and suretyship (*sponsio* etc.), in the incorporation of certain peculiar types of obligations in the Roman system, such as, *mutuum*, *commodatum*, *mandatum* etc., observance of certain forms and ceremonies to add sanctity to Roman contracts, but it can safely be stated that they do not differ on fundamental principles and that the differences and peculiarities are due to exigencies of circumstances. For instance, it may be pointed out that in Roman law of Sale, the vendor was required to indemnify the purchaser in respect of possession of things sold and had no responsibility for the quality of the thing sold—a remarkable contrast to the

English maxim of *Caveat Emptor*; there was also the necessity of going through the form of *mancipatio* and of recording a questionnaire and of payment of a real price. Every page of the text book exhibits the genius of Romans in setting up a highly developed and classified structure which guides us even to day to a great extent and also the creative faculty of Romans in interpreting old doctrines or in amending and adjusting old principles or even in evolving new principles.

The reason for inclusion of the law of "Delicts" in this chapter depicting different forms and procedures which should be observed for adding statutory sanction to breaches of agreements etc., is also to be found in the peculiar conditions of Roman State. It appears that the Romans had not yet reached the summit of development in this field and no clearcut distinction between criminal and civil obligation in contractual relationship was evolved by this time. But the University authorities have been wise in leaving out the topic of detailed rules on delict (namely, *Lex-Acquilia*) from the syllabus and, therefore, the matter is not being dealt herein.

Before conclusion, a few words on the Roman Law of inheritance and legacy becomes necessary. In this field as in other subjects, the Roman jurists demonstrated their practical and secular outlook in finding out solutions to problems facing their society in later periods. While our Hindu enunciators stopped at sanctioning adoption as a valid medium of succession with a view to continue the personality of the deceased, the Romans advanced one step forward and evolved the principles of testamentary succession. Of course, in the beginning Romans did not confine themselves to conferring a spiritual tie between the two generations, but entered into more practical and material issues like meeting obligations of

the deceased to translate the purpose of continuation of his personality into a practical affair. On the contrary, the Roman doctrine differed from the English system in enjoining upon the heir the rigour of accepting an insolvent succession and of the binding necessity of meeting liabilities of the deceased, though not realising any substantial asset from him (i.e. *Damnosa Hereditas*). Nomination of an universal heir (in *universum jus*) instead of distribution of property and arrangement of legacies was a more important feature of Roman law of testamentary succession in contrast to the English theory. In this connection, readers are requested to compare the position in Hindu Law. Even though a detailed examination of Hindu Law may not be undertaken, it can be pointed out that the majority of the Hindu community who are governed by the *Mitakshara* School of Hindu Law, broadly admit the necessity of meeting paternal debts by the heir and that the rival school, namely, *Dayabhaga*, does not permit the son to beget property of the father without his sanction and therefore payment of paternal debt is also an accepted doctrine. Of course, Hindu Law spares the heir of the burden of ancestral debt if tainted with immorality, because Hindus were more concerned with conferring spiritual benefit on the deceased. But the rigidity of old Roman Law had to be surrendered to meet the needs of new phenomena. The probability of liabilities predominantly overhanging an inheritance gradually made it difficult to find out an heir. Of course, slaves, when nominated, found it difficult to refuse the offer in the lure of obtaining freedom, but this enjoined the pains of disinheritance on the persons who were kith and kin with the deceased. Here, again, the inventive genius of Justinian plays the appropriate role who, with one bold stroke of pen, re-

moved unlimited liability of the heir. But even Justinian maintained the necessity of appointment of an heir in the rules of Testamentum. It is true that students may not find much interest in assimilating the different forms for making a valid will, like "Commissis calatis", "In Precinctu", "Per es et librum" etc. or those of Codicilli, or even rules of legacy (e.g., per vindicationem, per damnationem, etc.); but certainly there is much to learn from Roman law of testamentary succession as such, its growth in different ages (including differences between provisions in XII Tables and enactments of Justinian), the method how by degrees different reforms were introduced.

In fine, it can be said that it would be a very unwise step if the study of Roman Law

be completely excluded from the syllabus. Of course, Romans loved forms, but it cannot be denied that forms and ceremonies did not stand in the way of introduction of reforms, amendment of old rules, and introduction of new rules which proved to be necessary by the gaining of experience in later periods. Justice was not permitted to be sacrificed at the altar of formalism, whenever the conflict between the two was so manifest. It may be that Natural Justice owes its origin to the Greek Stoic philosophers, but certainly the Romans are to be credited with giving birth to the concept of Equity. Whenever statute proved to be too rigid, or unjust, or inconvenient, the Praetor was there to grant relief to the affected parties in some form or other.

"The welfare of the people, or of the public, is supreme law."

Paradoxical Hypothesis

By

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The Rule of law is one of the main characteristics of the British Constitution. The whole British administration centres round this principle which is regarded by Professor Dicey, as one of the chief principles, which serve as "a clue through the mazes of a perplexed topic". But actually, is it the pivot of the British constitution or is it a phrase of high sounding words to show off the democratic government? The answer to the latter question is in the affirmative.

In 1789 the National Assembly of France adopted the Declaration of the Rights of Man. This Declaration influenced the framers of the American constitution, who inserted the Bill of Rights in the constitution of the United States of America. The English constitution is based on the fundamental rights of individuals. When we say that British citizens are subject to the Rule of Law we mean that they are not ruled by caprice or by the arbitrary will of any individual or body, but only by the law of the land. The Rule of Law expresses the two-fold principle of 'legality' and 'impartiality' in the British Judicial System. But really speaking the British Government is administered by the caprice of the British Parliament in the illegal and partial way, superseding the jurisdiction of the judiciary. As Lord Wright has observed—"In the constitution of this country (Great Britain) there are no guaranteed or absolute rights. The safe-guard of British liberty is in the good sense of the people and in the system of re-

presentative and responsible Government".

Let us discuss—how "Rule of Law" is superseded by the British Parliament. In the first place the supremacy of the law may be replaced by the supremacy of the executive authorities. The most notorious examples are of course, the German "Gestapo" and the Russian "Ogpu", the secret government police for enforcing not the law but the will of the executive. It is clear that in such cases there is no "Rule of Law", as defined by Lord Hewart. "The supremacy or predominance of law, as distinguished from mere arbitrariness, or from some alternative mode, which is not law; of determining or disposing of the rights of individuals".

The Rule of Law asserts the supremacy of law. When this law is administered in the case of every citizen, then it may be said that law rules. But in reality this sort of procedure is not properly maintained to conduct the Government according to the policy of the Executive. The concept of "equality before law" means the equality of rights and duties. And also this equality of rights and duties also vary in circumstances and conditions. It means that among equals the law should be equal and should be equally administered. The term—"among equals"—are very vague and will be justified in a arbitrary way in the law courts. Therefore the supremacy of the Rule of Law is degenerated and defied by the Judiciary contrary to the rights to

equality. The provisions for discrimination in Indian constitution has been made. Nothing in Art. 29 which provides protection of interests of minorities shall prevent the state from maintaining special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled Tribes.

Sovereignty means — "supremacy". In Rousseau's view sovereignty lies in "people" but in the present democratic set up this principle of Rousseau does not hold good. In the British constitution sovereign power lies in Parliament. In the celebrated words of de-Lolme, "Parliament can do everything but make a woman a man, and a man a woman". Again, in the distinction of political sovereignty and legal sovereignty, the legal sovereignty of Parliament is superior to the former. For it is plain that the sovereignty of the electorate consists only in their power to choose their representatives. After this has been done the elector has no further voice in legislation. Even if Parliament were to pass a measure that was entirely contrary to the will of the majority of the electors they would have no remedy whatever. All they can do is to choose different ones at the next election and they cannot force a dissolution of Parliament for the purpose of securing a fresh election. So Rousseau said, "though the people of England think they are free, they are much mistaken; they are so only during the election of Members for Parliament; so soon as they are elected the people are slaves—they are nothing".

What do we mean by "Democracy"? In the famous words of Abraham Lincoln — "Democracy means—Government of the people, by the people, for the people". i.e. it includes full liberty and equality of the citizens. Representation is the ordinary

method by which democratic Government is carried on now-a-days. It means the majority rule. There has been a tendency in Great Britain for the judicial powers to be granted to the executive authority. There has not, of course, been any attempt to interfere with the rights of private citizens among themselves. This tendency shows the oligarchy slowly creeping in the British Parliament. Practically the Rules of Law still holds good, only in theory. "Parliament has, it would seem, abandoned the cherished principle of the supremacy of the ordinary courts and given up its former jealous concern for the rights of the private citizen by thus removing certain cases from the jurisdiction of the Judges and since Parliament has done this there is no more to be said, for there is no higher authority than Parliament". In the words of Dicey, "the British Parliament can alter the succession to the Crown or repeal the Acts of Union in the same manner in which they can pass an Act enabling a company to make a new railway from Oxford to London".

The chief instrument of a state is Law. If "law" is handled by the caprice of the members of the Parliament, then there remains no rule of law. The "Rule of Law" in English constitution is the nickel crust that dazzles the eyes of the foolish people of the democratic countries. The English constitution can be contrasted with oppressive and despotic character of the French Government. The tendency of the executive to encroach upon the rights of the judicial and legislative authorities has met with strong criticism and condemnation from distinguished judges and lawyers. It is a great departure from the position won for British citizens through centuries of strife and contest with despotic rulers. As there is no separation of powers in British constitution so the executive is closely related with the legislature. Again, the line dividing the exe-

cutive from the judicial sphere is also somewhat blurred. Therefore the ministers, who are the heads of the executive department and also the members of the legislature, are all in all in the administration of the Government. Adolf Hitler said—"I was the supreme court of the German Nation in my own person." Here also the British minis-

ters, who sail and float in a same fleet, are together the supreme court of the English Nation. Baron-de-Motesquieu describes in his great work—"The Spirit of Laws", when the legislative and executive powers are united in the same person or in the same body of magistrates, there can be no liberty....."

"If I am to die by the bullet of a mad man, I must do so smiling."

107 Role of Law in a Democratic Society

By

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First Year Student.

It is the aim of democracy to lead human life to its fullest development. It has the tendency of conducting a constant trend of human affairs towards the perfectibility of mankind and moving forward towards the goal of greater prosperity. Prosperity includes not only an abundance of physical goods and comforts or assurance of economic and political security, but rich intellectual achievement, fullness of artistic and spiritual life and ample recognition of the exquisite and unique place of creative instincts and talents. For, it is beneath human dignity to become a mere cog in a machine; and all inventions and discoveries, transmissions and communications which tried to make the world a closely knit community contemplated by Mr. Willkie¹ had the ultimate motive of helping man to cultivate his personality. The cultivation of tastes, individual perceptions and aspirations are the results contemplated when Mr. James Russel Lowell speaks of giving mankind "a common nervous system."

Now, liberty is the condition of this development. If a man feels that he has been bogged down in the apathy of regimented thought or that he has been deprived of certain rights essential to the cultivation of his intellect, his individuality can never flourish. If, on the other hand, he is not denied the right to communicate his thoughts and

at the same time, if he be a citizen whose opinion counts, his personality is protected against the worst repressions.

This fact, therefore, leads us to the contention that every person should be given to enjoy the maximum of liberty. But, this is a confusing riddle—for, how can maximum freedom be bestowed on a person without infringing that of another? One of the thorniest problems of modern men is to harmonize liberty of the individual with the liberty of all and to strike a proper balance between them.

Out of this enigmatic question arises the popular controversy on the utility of a state and the interference of governmental actions. When Tom Paine cries out—"every government is a necessary evil", he looks at legal rules as an undue abridgement of individual liberty; on the other hand, Dr. Bosanquet upholding the state as the "hinderer of hindrances" emphasized on the role of law essentially to bring about an "ordered freedom" giving everybody his respective opportunity for self-development.

Without unnecessary roving into the labyrinth of this intricate controversy, this much can be mentioned that when different people with different tastes, aspirations and perceptions live in a society, there are certain uniformities of conduct that should be maintained. Robinson Crusoe on a deserted island may defy the natural instincts of a man; but for others, granting of maximum liberty

¹"One World" by Wendell L. Willkie; published by Cassell and Co. Ltd, First publication, 1943.

will inevitably lead to chaos and confusion. "The theory of philosophic anarchy," says Professor Laski, "is impossible as long as men move differently for the attainment of different ideals."² For, at some point when the spontaneity of their behaviour ceases to be practical enforced acceptance in a common way of action is necessary.

Law, thus, does not curtail liberty of the individual; it channels liberty through proper course so that every individual may have sufficient recourse to it, thus procuring for the society the benefit of development of human personality to the maximum possible extent. For, as very deftly epitomised by Hon'ble Mr. Justice C. E. Hughes, "Civilisation itself is progress in multiplying restraints to conserve opportunities."³

Law, therefore, is something more than an artificial and external element imposed on a society—it is an effort that arises from within. "Law", says Cicero, "arises out of the nature of things."⁴ The source of law is not the power that enforces it, but the effort that gives it life. Grotius also expressed the same view when he pointed out that upon the broad principles of natural justice which is universal and irrefutable, the theories of municipal law are formulated. Hence, it is in the instincts of a normal person to abide by law. "To invalidate this law is never morally right, nor is it permissible to resist its operation, and to annul it is wholly impossible."⁵ The reason is as follows: majority of the people want justice and that constitute the harmony of their will

"Justice is the cement of society",⁶ and standing behind the law, not infrequently provides the key to its interpretation. Pascal very truly pointed out that both reason and force are essential in the proper concept of law; actually its true voice is the voice of reason, not that of any earthly magistrate and its true force is the force of inherent necessity, not that of artificial machinery.

Specially, in our own days, the field of law has been vastly enlarged. Immense increase in population and congestion in towns and cities have extended the scope and possibility of the clash of interests. Gradual industrialisation and economic development have changed people's perspective of morality and ethics. The strive for development and the desire to become rich are gradually altering their values. For, how can the Hindu ideal of self-mastery and renunciation of desire go hand in hand with the desire to become rich? And in the process of development these countries will undoubtedly lose much of their beauty, stability and piety.⁷ The concept of 'economic man', whether be it liberal view point of the Hedonists or the more ambitious variant of the Marxists, will inevitably corrode the ideal of integral humanism.⁸ Law, adopted according to the needs of particular circumstances, is the only machinery to make it a central point of concern to retain a whole picture of human individual for whose benefit economic development is necessary.

Moreover, democracy has its own capacity for tyranny; and it manifests through increasing power and interference of the state in almost all social activities. We cannot

² For an excellent exposition of the problem, interested readers are requested to consult Prof. Harold Laski's "A Grammar of Politics."

³ "Law and Liberty" by Hon'ble Mr. Justice C. E. Hughes, in "Lawyers' Treasury".

⁴ "Republic III" of Cicero, translated by Sabine and Smith.

⁵ Grotius's view had been quoted by Prof. Sabine in "A History of Political Theory." Page 424.

⁶ "Democracy and the Individual" by Prof. C. K. Allen, page 61.

⁷ "Development for Free Asia" by Maurice Zinkin, see Chapter 2 ("The Price of Development").

⁸ See the excellent article "Industrialisation and Integral Humanism" of Prof. Amlan Datta in his "For Democracy".

ignore the insidious encroachment under the guise of official discretion—"the armoured car of bureaucrats which runs so freely without showing a head to hit." Unauthorized seizure of papers and other materials, suppression of opinions and defilement of secrecy, arrest without showing cause are a few instances of the effect of uncontrolled increase in the power of the state. While it is quite appreciable that proper use of organization must be made so as to facilitate purposes that are essentially social, too much zeal for organization may result in the frustration of vitality of the society and denunciation of freedom of the individual; and who can say whether limitless extension of it shall not result in the inculcation of intolerance against those who betray differences, thus polluting the very source of social solidarity? Just as without government regulation liberty of the individual is crushed by uncontrolled economic forces; under extreme socialism it is crushed by political power functioning in the economic field.⁹

It has often been complained by the laissez-faire politicians that law brings about complexity in regulation in a society. But, law actually controls the individuals in a society; and there is a difference in the meaning of the two terms. For the minimum complexity in regulation a pre-imposed

control is necessary and the establishment of control streamlines regulation. The absence of law in a society can be compared to a motor car without a driver, where the passengers keep reclining over the steering-wheel to give it twists and complex regulations regarding the degree to which each may turn the wheel are provided so as to prevent them from fighting over it. A well-ordered society with an efficient legal system has a driver, so these regulations are unnecessary.¹⁰

Law balances the various social forces in a nation which are fighting for supremacy. This fight is natural. The rule of law, therefore, does not prevent this fight; but it provides rules for combat and thus maintain unity of the state in spite of conflicting aims of different groups.¹¹ It is, therefore, in a complex society like ours, necessary to maintain the state as a centre of political co-ordination with law as its machinery; in the absence of such machinery and hence co-ordination, society will lapse into disorder and from disorder it will react back into overcentralized totalitarianism.

⁹ I beg apology to Prof. A. P. Lerner for using the metaphor coined by him though in a completely different context. See his "The Economics of Control" or "The Economic steering wheel" University, Review June 1941.

¹¹ A remarkable article by an anonymous writer in the "Law Quarterly Review", April 1943.

⁹ "Law and Liberty" by Hon'ble Mr. Justice C. E. Hughes in Lawyer's Treasury'.

"The administration of justice is the firmest pillar of government".

Our Fundamental Rights—A Myth

By

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"Rights are the groundwork of the State. They are the quality which gives the exercise of its power a moral character, and they are natural rights in the sense that they are essential for the good life". Their inclusion in the constitution of a country makes them inviolable, commanding the respect of the people and the Government alike. Further, it is a famous dictum of Prof. Laski, "A state is known by the rights it maintains".

Fundamental Rights, have been given due importance in the Constitution of most of the nations of the world. America gave the lead and we find it in the constitutions of Germany, Russia, France, Japan, India, etc. Even in a country like England, where there is no written constitution, on the basis of past traditions and common law decisions these rights are fully enjoyed by Englishmen as a matter of practice.

Insertion of fundamental rights in the constitution, is in, significance, attached to the individual in the philosophy of the State, because state exists for the individuals or citizens, for securing their welfare and for the development of their personality. Our country is a Democratic Republic and certain rights of the citizens are absolutely vital and essential for the effective working of a democratic republic. Democratic Government as functioning in the world means government by the majority with full freedom to the minority to convert itself into a majority. Their insertion is also a fetter

on the absolute power of parliament in normal time, and this fetter can only be altered or removed by an amendment of the constitution. This theory is so correct that even in the fascist constitution the fundamental rights of citizens are affirmed and in appearance, protected, but in substance they remain only on paper.

But in a democratic republic like India, it is very essential that the fundamental rights guaranteed by the constitution are exercised by the citizen in their day to day affairs and these rights also cast a duty on the courts to see that they are not violated. It is well accepted that when the state itself is in danger internally or externally, the rights of the individual must not obstruct the Government, in taking action necessary for the protection and safety of the state, but in no other circumstances suspension, curtailment of, or even interference with such rights of individual are desirable. The state cannot, under the guise of protecting the public, arbitrarily interfere with private business (*New State Ice Co. Vs. Liebmann* (1931) 285 U. S. 262 (278)). Further it was also affirmed in *Dwarka Prasad Vs. State of U.P.*, (1954) S.C.A. 204 that the legislation which arbitrarily or excessively invades the rights cannot be said to contain the quality of reasonableness.

But, we find that in practice, such rights are being curtailed either by amendments or by legislation and it means transfer of

power from the hands of citizen to the hands of executive. This practice mars the soul of democratic republic, because, opinion plays a dominant role in the success of a democratic republic.

If we examine the recent amendments, legislation and case laws, we would find the correctness of the above statement. Several new grounds of restriction upon the freedom of speech have been introduced by the First Amendment viz. (1) Friendly relations with foreign, (2) Public Order, and (3) Incitement to an offence.

Individual rights guaranteed by Art. 19 are in general binding upon both the executive and the legislative, however, the authorities are permitted by the constitution to make valid exceptions to the rights within the limit imposed by the constitution. Such grounds, in brief, are security of the State, public order, public morality and the like! "This exception may be said to be a partial adoption of the 'Police Powers' in the body of our Constitution"—(D. Basu's commentary on the constitution of India. Vol. I on page 75). Further, it has been said in Art. 19 Cl. (2) to (6) that "such reasonableness."

What is reasonable restriction of the freedom guaranteed by the various sub-clauses, is a matter to be decided by the court, when a case comes before it, in the light of the circumstances attending the case and it is obvious that there being no fixed standard of reasonableness that Judges, who constitute the particular court, would be largely guided by their own economic and social philosophy, subject, of course, to precedent (American Supreme Court observed in *Dejonge vs. Oregon* (1937) 290 U.S. 353).

The yard stick of the reasonableness is as elastic and indeterminable as the chancel-

lor's foot of equity. We may quote the following lines of Pope in this connection,

*"It is our judgment as our watches,
None go just alike,
Yet each believes his own".*

The fundamental rights of freedom of speech, the press and of assembly guaranteed by the constitution may be abused by using speech or press or assembly in order to incite violence or crime. The people through their legislation may protect themselves against that abuse. But the legislative intervention cannot find justification only by dealing with the abuse. The rights themselves cannot be curtailed, (Embodiment of this doctrine in Art. 19(1) (2) of the West German Constitution (1948).

Enumeration of rights in the constitution is not by itself a complete guarantee of their observance, what makes them real is a general atmosphere favourable to their maintenance and the readiness of the people to respect and vindicate them. In India, we feel that the rights are given by the left hand and are taken by the right hand. Mr. Schwartz made a vigorous criticism of the majority view in his article "Comparative view of Gopalan's case" (Indian Law Review Vol. IV, page 276-299 esp. P.P. 293-299), on the decision of A. K. Gopalan's case (1950) S.C. 7.174 that law in Art. 21 of the constitution means a state made law. Mr. Schwartz grounds of criticism are firstly, that his view fails to distinguish between forms of justice and its underlying inherent principles, secondly, it is a pedantic "Dictionary" meaning of the term, thirdly, such a view impairs the effectiveness of the Article, because there is no need for the constitution to say that the executive must follow the procedure established by the legislative which ever otherwise, it has to do and this view is also influenced by the outmoded imperative theory of law.

We often find that the expression of public opinion, even in a peaceful manner is suppressed with the help of Preventive Detentions Act, East Punjab Safety Act and other Acts like this. Numerous cases may be quoted where it was contended on behalf of petitioner that the grounds given are not real, and real ground is suppression of expression of public views, to quote a few *A. K. Gopalan vs. State of Madras*, *Dr. B. G. Kher vs. State of Delhi*, *Chintamanrao and others vs. State of Madhya Pradesh*. 1951 S.C. 118. In *State of Bombay vs. Athinarao Shri Dhar Vaidye* 1951 S.C.(157), it was held in the High Court that the state of Bombay was acting in a mala-fide manner and the detention was illegal, but the same judgment was reversed by the Supreme Court by majority. Executive may amend the constitution as they think fit for carrying out the function of their Govt. but while doing so they should not forget that—the opposition of today is govt. of tomorrow—and as such a day may come when these very provisions which they are making to suppress the views of their opponents, will be legal for the future government to detain the person of present govt. In no constitution of the world such law has been enacted by the constitution makers.

Further, it has also been observed by Markose, A. T. in his book, "Judicial Control of Administrative Action in India" (on page 183) on imprisonment of Indian Citizen on the mental satisfaction of the Government in power that, "The case law shows that a very large percentage of all habeas corpus petitions in India arose under the Preventive Detention Act. The existence of this law clouds the personal liberty of Indian Citizens and overwhelms the remedy of Habeas Corpus. The Preventive Detention Act is only one of many statutes under which the personal liberty of individual can be curtailed in India."

Now the question arises, whether it is

reasonable to vest such power in the executive to be exercised on its subjective satisfaction. It was observed in *Raghubir vs. Court of Wards*, 1953 S.C.R. 1049 (1952.54) 2.C.C. 187 that when a law deprives a person of the possessions of his property for an indefinite period of time merely on the subjective determinations of an executive officer, such law on no constructions be described as a reasonable restriction on the freedom of property.

The fundamental right to form associations or unions guaranteed by Art. 19 (1)C has a wide and varied scope for its exercise and its curtailment is fought with such potential reactions in the religious, political, and economical fields, that the vesting of the authority in the executive government to impose restriction on such right without *allowing* the grounds of such imposition, both in their factual and legal aspect to be duly tested in adjudicial enquiry, is a strong element which should be taken into account in judging the reasonableness of restrictions imposed on the fundamental right under Art. 19(1)(c) (*State of Madras vs. Row*, (1952) S.C.R. 597(607) and on the other hand we will appreciate the spirit underlying the U.S.A. Constitution "Congress should make no Law.....abridging the rights of the people peaceably to assemble (The first Amendment to the constitution of U.S.A.).

Now let us consider the new provision of restriction upon the freedom, of speech and expression. In *Rames Thapper vs. State of Madras*, (1950) S.C.R. 594 the Supreme Court observed that the imposition of Censorship on a journal is a restriction upon the freedom of speech and expression guaranteed by Art. 19(1)(a) subsequent to this decision, the word "reasonable" has been inserted in Cl.(2) of Art. 19, so that a restriction which is not reasonable is not valid. The Madras High Court in *Ramkrishnaya vs. District Board* (1952) I.M.L.J. 38 has

held that pre-censorship is not a reasonable restriction, whether in respect of the freedom of expression or of similar other fundamental rights guaranteed by the constitution. It was also held in *Brij Bhushan vs. State of Delhi*, S.C.R. 1950 (605) that the imposition of pre-censorship on a journal is a restriction on the liberty of the press which is an essential part of the rights to freedom of speech and expression declared by Art. 19(1)(a).

In, *The Collector of Malabar vs. Erimal Ebraim Hajee* (1957) respondent was a man of about 70 years age and at the time of his arrest he was also suffering from paralysis. On his application for a writ of habeas-corpus the Supreme Court showed full sympathy with him, considering his old age and paralysis but their hands were tied with the provisions of Article 19 (a) to (c) and (g) and as such though they said, "He should not be sent back to jail custody" yet they showed their inability to make such an order. Does it not show that the hands of judiciary are so tied by precedents and legislation that they are unable to do what they think justified? If we consider the right against discrimination we will observe the same thing there also. Art. 15 (1) provides that state shall not discriminate on the ground of religion, race, caste, sex, place of birth or any of them and again Art. 29(2) provides that no citizen shall be denied admission into any educational institution on the grounds only of religion, race caste, language or any of them. In *State of Madras vs. S. E. Dorajrajan* 1951 S.C.J. (313) and *State of Madras vs. C. R. Srinivasan* 1951 S.C.J. (313) Supreme Court considered the Madras communal government order as inconsistent with the fundamental rights of the petitioners as this order discriminates against the right of petitioners guaranteed by Art. 15(2) and 15(1). But, this right was curtailed. Following the decision of the Supreme Court the constitution

was amended and clause 4 was added to Art. 15, on consideration of the interpretation of the equality clause. From an overall point of view it can be said that Art. 14 has lent itself to such a variety of applications that no uniform principles could be involved in details. Art. 17 which abolishes "Untouchability" creates no right but amounts to a mere restrictions and the same applies to Art. 18 which refers to the abolition of titles.

Further, if we consider the right to property, as enumerated under Art. 31 to 31B, we would find that this right as originally guaranteed by constitution and as expounded by our Supreme Court, has legally speaking been in-effect, largely abrogated by the addition of new clause (2) of Art. 31 by the constitution (First Amendment) Act, 1951 as apparent from the other provisions, the evasion of this right.

By constitution (fourth amendment) Act 1954, Art. 31(2) was amended and 31(2A) was added and all these resulted into further curtailment of our right. The executive government can pay any compensation it thinks fit and there is no scope for judicial review too. Again, there is no reference in clause (31)2A to any question of public purpose, as we find in clause (2) of Art. 31. This means that a person may be deprived of his property under a law made as per clause 1 and 2A of Art. 31, even through such deprivation is not for a public purpose.

Mr. Justice Douglas, Judge of United States supreme court observed on this amendment in course of his Tagore law lecture, delivered in the University of Calcutta in July 1955, "Whatever the cause, the 1955 amendment casts a shadow over every private factory, plant or other individual enterprise in India. The legislature may now appropriate it at any price it desires, substantial or nominal. There is no review of the reasonableness of the amount of compensa-

tion. The result can be just compensation or confiscation-dependent-wholly on the mood of parliament".

It appears to us that our fundamental rights are under-going a vast change, curtailment and restriction and whatever might be the socio-political justification of such changes, legally, speaking it is becoming a myth for the citizen, because the American doctrine, "A statute void for an unconstitutionality is dead and cannot be rectified,

by a subsequent, amendment of the constitution" is not applicable in the case of India, as Art. 13, of our constitution says that the offending statute is not wiped out of statute book, altogether, similar view was observed by Supreme Court in *Bhikaji vs. State of Madhya Pradesh* 1956 S.C.A.I. (9-10).

To sum up, our Fundamental Rights are hedged in by numerous conditions and provisions which mark their application doubtful, deceptive and even discretionary.



"However the law, to make it a mystery and a trade, may be wrapped up in terms of art, yet it is founded on reason and obvious to common sense."

The Principle of Judicial Review of Legislation—its Application under Different Constitutional Systems

By

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The apprehension of an executive dictatorship in the hands of an all-powerful head of the State led to the specialisation of the functions of the state in three organs viz., the legislative, the executive and the judiciary. But with the increasing demand on democracy to do social good it has been found that specialisation of the functions of the state is neither possible nor desirable. No water-tight division of power amongst three organs is possible. In the interest of the greatest good of the greatest number it is not desirable either.

In a federal type of Government the supremacy of the Judiciary can hardly be over-emphasised for its smooth and efficient administration. The constitution specifies a sphere of action and authority for the Union and its component parts, encroachment by one upon the other is, therefore, highly undesirable. Hence the necessity of some supreme umpire, arbiter or judge, 'to enforce respect for the constitutional division of competence and to decide issues arising out of conflicts of authority.'¹ For the first time in the constitutional history the supreme court of the United States assumed and exercised this role of a supreme umpire and paved the way for smooth and efficient running of the American Federation. The

principle of judicial review of legislation may, therefore, be described as a pre-condition for the success of a federation and an offshoot of judicial supremacy maintained and enforced in a successful Federal Government.

Now the object of the present article is to make a study of the application of the theory of judicial review of legislation under different constitutions of the world. The short compass of this article would not permit me to make a detailed study of the whole question and as such I have kept it confined strictly to its objective aspect only. The subjective side of the question may conveniently be left to the practical lawyers and constitutional jurists for dealing with.

The study of the subject-matter in question requires a proper and clear understanding of the nature of judicial review of legislation, our endeavour would not, however, be of furnishing any water-tight definition of the same, but only to describe the theory as 'an extraordinary function exercised by the courts of some countries, either in pursuance of authority expressly conferred by the constitution or assumed by them as inherent in or incidental to the judicial power, is that of passing upon the constitutionality of statutes enacted by the legislative and of refusing to give effect to those which are contrary to the constitution, or which, as it is commonly said in Europe, are *ultra vires*

¹ Political Science And Government—Garner p.p. 770.

or in excess of the authority of the legislature which enacted them'.²

Let us start with the constitution of the United States—the originator of the theory and the follower of the same from the very beginning. In 148 years (1789-1937) 64 acts of the Congress out of a total of approximately 58,000 have been declared unconstitutional by the Supreme Court. This simple fact would be enough to assess the importance of the principle of judicial control under the United States Constitution, but there had been no express recognition or sanction of the principle either by the Federal Constitution or any of the State Constitution. In 1803 the United States Supreme Court recognised the principle for the first time in the celebrated case of *Marbury vs. Madison* (1 Crauch 137) by holding an act of Congress to be inoperative owing to its non-conformity with a provision of the Federal Constitution.

But the issue raised a great storm in the United States during its early stages. A class of Statesmen held that the judicial control of legislation is an inherent part of the judicial power and as such needs no express authority, for its exercise. Hamilton in 1788 advocated the theory by asserting that there is no position which depends on clearer principles that every act of a delegated authority, contrary to the tenor or commission under which it is exercised is void. No legislative act, therefore contrary to the constitution is valid.³

In the case referred to above, viz., *Marbury vs. Madison*, Marshall, Chief Justice, discussed the question in detail and decided that no law would be valid if it is contrary to the provisions of some higher law, i.e. the Constitution. Since then the question of the

supreme court's review of legislation has been settled once for all; it now makes the judges the guardians of the constitution and provides the only safeguard which has hitherto been invented against unconstitutional legislation'.⁴

With the origin and development of the principle being traced in the United States, we shall try to give in the following pages a bare outline of the same as is found in different countries. A study of the European constitutional system reveals the fact of its being unknown to them for a long time. In the old German Empire (1871-1919) the courts were granted the power to decide 'formal' validity of a legislative act i.e., whether constitutional requirements have been complied with and whether promulgated by the head of the state; but the decision regarding the 'material' validity of a legislative act i.e., whether any constitutional provision has been abridged or not or whether it is within the competence of the legislature to make such an act, was not within their jurisdiction. Though the Imperial Court (*Reichsgericht*) had the power to determine whether a law passed by the Constitution was contrary to the Imperial Constitution or not yet the power to judge the constitutionalities of imperial law was not recognised. Under the new constitution a peculiar constitutional development had been responsible for the recognition of the Supreme Court's power to declare a national law unconstitutional.⁵

The new constitution of Prussia (vide Article 87) grants to the state Supreme Court the power to decide in the event of any constitutional conflict but the power of decision on the question of unconstitutionality is outside the scope of the Prussian Supreme Court.

²Political Science And Government—Garner p.p. 754.

³The Federalist No. 78.

⁴Law of the Constitution—Dicey p. 125.

⁵The Judgment by Civil Division on November 4, 1925; Also Blachly and O atman p. 116.

Under the Austrian Constitutional system, though the power of decision on questions of unconstitutionality of federal laws was granted to the Supreme constitutional Court (Vide Article 140, The Austrian Constitution of 1920), the subsequent constitution of 1934 abrogated this power.

In Swiss Federal system the Federal Supreme Court has power to declare the cantonal legislative enactments invalid under Article 113 of the Swiss constitution, but unlike the American system it cannot call to question the constitutionality of law passed by the Federal legislature.

Turning our attention to the constitutions of the British Dominions and Latin America, we find that in the Dominion of Canada, Dominion Acts and Provincial acts may be declared *ultra vires* if they are contrary to the British North America Act.⁹

In Australia it has been recognised that (vide Article 109) "when a law of a state is inconsistent with a law of the commonwealth the latter shall prevail and the former shall to that extent of its inconsistency be invalid." The Australian courts have no direct power to decide upon the question of unconstitutionality, but on principle, it has been recognised to be an incident of the judicial power and as such it belongs to all courts as a matter of right. The number of cases covering the unconstitutionality of state law is however relatively small.

Among the Latin American countries the principle of judicial review of legislation is found in some way or other in Argentina, Brazil, Bolivia, Columbia, Costa Rica, Cuba, Mexico, Haiti and Venezuela. In the case of Brazil it is to be noted that the principle has been fully recognised as in the case with the United States of America. The limited

space here would not permit me to deal with other cases in some detail.

Having thus considered the question of judicial control of legislation in countries where it has been fully and/or partially settled our next task would be to study the implication of the issue in those countries in which it has got no applicability at all.

In Great Britain the supremacy of the Parliament is of overall importance; no act of it can therefore be held invalid or 'unconstitutional' by any court of law. In France also the courts have no jurisdiction in declaring parliamentary acts null and void. In a case in 1833 in which a Press law passed by the Parliament was in plain violation of Article 69 of the Constitutional charter of 1830, the court of Cassation held that the courts had no power to declare any law unconstitutional. The absence of any judicial control of legislation is also found in the new constitutions of Finland and Yugoslavia and the constitution of Poland expressly provides that no courts shall have any power to inquire into the validity of 'duly promulgated Statutes' (vide Article 81).

Now it is to be noted that the principle of judicial review of legislation has been recognised in India also, though in an indirect and modified way. The Indian Constitution recognises the supremacy of the Parliament as representing the supreme will of the people. But at the same time and unlike in Great Britain, the Supreme Court of India can interpret a legislative enactment and declare it *ultra vires* provided it is beyond the competence of the legislature according to the scheme of the distribution of powers as laid down in the constitution or provided it abridges any of the fundamental rights guaranteed under part III of the Constitution. Moreover (1) the original jurisdiction of the Supreme Court relates to any

⁹ Judicial Review of Legislation in Canada—Haines p.p. 5; also the Constitution of Canada—Munro. p. 219.

dispute between the Union and the States in anyone of the following ways, viz.,

(a) The Union *vs.* One or more states,

(b) The Union and any state or states *vs.* One or more other states, and (c) A state or states *vs.* A state or states.

(2) In its Appellate jurisdiction the Supreme Court deals with the question involving the interpretations of the Constitution on the certificate of the High Court (vide Article 132), and, (3) the Advisory jurisdiction of the Supreme Court comes in to play as and when the President seeks the expert opinion of the Supreme Court on any question of law or fact of public importance.

The authority and jurisdiction of the Supreme Court as enumerated above, it should be noted, are indirect in nature—it cannot sit in judgment over the wisdom of the legis-

lature as in the United States. The constitution of India thus strikes a middle way between parliamentary and judicial supremacy. It does not, envisage the judicial system of India being degenerated into a kind of 'judicial oligarchy'; it curbs down any attempt towards the growth of any legislative dictatorship.

We have attempted above a study of the principle of judicial review of legislation under different constitutional systems. In this connection it is submitted that the recognition of the principle far outweighs its non-recognition in various countries of the world. The principle has found great favour with continental jurists; of late it has been widely introduced in various countries. There is therefore clear and perceptible indication as to its becoming a permanent feature of the jurisprudence of the world.

"When the law is broken down, injustice knows no bounds, but runs as far as the wit and invention of accusers, or the detestation of persons accused, will carry it."

Constitutional Aspect of the Berubari Issue

By

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Let us start with the question whether any portion of a state territory can be constitutionally transferred to any foreign country. Indeed there is no direct provision in the constitution, authorising a transfer of a portion of a state territory to any foreign country. However, some quarters have been confused by the provisions contained in Art. 3 of the Indian Constitution and have indulged in thinking that the provisions in Art. 3, especially those contained in clause (c) and clause (d) of the Article indirectly permit transference by Parliament of portion of State territory to a foreign country. That such a notion is completely misleading and unwarranted, will appear from an analysis of the Art. 3 in the perspective of the other relevant provisions of the Indian Constitution.

Article 3 is concerned only with inter-state adjustments and it has got nothing to do with transfer to a foreign country. Clause (a) of the Article 3 contemplates formation of new state; clause (b) and clause (c), of, increment and diminution respectively of the area of a state, clause (d) and clause (e), of the alteration of boundaries and name of a state respectively; the very scheme of the Article 3 indicates that the Article is intended only for inter-State adjustment and has got nothing to do with a transfer to a foreign country. However, even apart from the study of the scheme of the Article, we shall reach the same conclusion from a short logical analysis of the

Article itself as reflected in the light of the other relevant provisions of the Constitution.

By virtue of Art. 1(1) of the Indian Constitution, every state enjoys a constitutionally guaranteed membership of the Indian Union. Parliament has no authority to expel any state from the Indian Union and to cede it to any foreign country, for, the obvious rule is that a constitutionally guaranteed status cannot be abrogated by the sweet will of the Parliament unless so authorised under some specific provision of the Constitution. Art. 2 expressly makes provisions for inclusion of new state in the Union, but the Constitution nowhere, directly or indirectly, speaks of exclusion of any state from the Indian Union. Hence the natural presumption as appears from the relevant provisions, is that the authors of the Constitution did not contemplate exclusion of a state from the Union. Even an extreme violence of the language of Art. 3 will not be able to provide the slightest scope to indulge in thinking that the Parliament is entitled to exclude any state from the Indian Union and to cede it to any foreign country. Now, in this perspective, is it not anomalous to suppose that the Parliament, though not entitled to cede any state to any foreign country, is yet entitled under Clause (c) and Clause (d) of the Art. 3 to cede any portion of a state territory to a foreign country? Such interpretation is absolutely misleading. Clause (c) of the

Art. 3 authorises Parliament to diminish the area of a state, and Clause (d) authorises to alter the boundaries of any state. It is really, very difficult to understand how Parliament can, in the name of diminishing the area or altering the boundaries, of any state, transfer a portion of a state territory to a foreign country. The effect of such an interpretation if accepted, will be that the Parliament though disentitled to cede any state to any foreign country, is yet entitled to cede any portion of a state territory to a foreign country, in the name of diminishing the area or altering the boundaries of a state. It seems absolutely arbitrary to imagine that while the authors of the Constitution intended to disentitle the Parliament to cede any state to any foreign country, they at the same time intended to permit transference of a portion of a state territory to a foreign country. Such a proposition is necessarily baseless and unreasonable. What is more peculiar is that even for argument's sake if we accept that the authors of the Constitution really intended at one and the same time to make provisions disentitling the Parliament to cede any state and yet entitling it to cede any portion of a state territory to a foreign country, we shall curiously observe that the latter provision very smoothly serves to impose a virtual defeat on the former one. In such a case the Parliament could in the name of diminishing the area of a state, cede the entire territory except the last square inch of a state, to a foreign country which would mean a virtual cessation of the state concerned and which obviously the authors of the Constitution neither intended nor desired. Hence such an interpretation which keeps open a door for committing a fraud on the Constitution should necessarily be discarded. The inescapable conclusion, therefore, is that Art. 3 applies only to inter-state adjustments and has got nothing to do with transfer to a foreign state; in other words, the Parlia-

ment is not entitled in any way to transfer any portion of a state territory to a foreign country.

It has again been argued by some responsible quarters that Berubari issue is not a case of transfer, but a case of boarder adjustment and hence the question of ineligibility of the Parliament to transfer does not at all arise in the case. The argument seems to be based on a very poor reason. It is indeed a very poor consolation to think that the cessation of a densely populated area of several square miles is not a case of transfer, but a case of boarder adjustment. If the area proposed to be ceded is shown to be included in the territory of West Bengal, it will be a poor defence to distinguish between transfer of territory and boarder adjustment; it is inconceivable to sustain a plea of boarder adjustment where such adjustment directly and definitely involves a transfer of a vast territory to a foreign country. What we are to ascertain now is whether the area proposed to be transferred is included in the territory of West Bengal. The territory of West Bengal has been defined thus in the First Schedule of the Indian Constitution: "The territories which immediately before the commencement of the Constitution were either comprised in the province of West Bengal or were being administered as if they formed part of that province and the territory of Chandernagore....." Hence as regards the area proposed to be ceded to Pakistan, we need not even enter into complicated questions like whether the area is a disputed or undisputed one or whether it has been referred to in Bagge Award or Radcliff Award, because once it is established that the area has been administered before the commencement of the Constitution, as if it formed part of the province of West Bengal it will be included in the state of West Bengal, in which case the Parliament will

be incompetent to cede it to Pakistan in the name of boarder adjustment or whatever other name they may please to call it. It is a question of fact to decide now whether such area has been so administered and I think the answer will be undisputedly affirmative. This will lead to the inevitable conclusion that Parliament cannot in contravention of the Constitution pretend to assume to itself the power to transfer the Berubari enclave to Pakistan; if it does so, it will be *ultra vires* the Constitution.

Some quarters are again confused by entries 10, 13 and 14 to List I of the Seventh Schedule and Art. 248 and Art. 253 of the Indian Constitution. But these entries and Articles only enumerate the subject-matters over which the Parliament has power to make laws; mere enumeration of subject-matters does not in any way mean that the power of the Parliament to legislate over them is unlimited. Such power is definitely subject to limitations imposed, if any, by the other provisions of the Constitution. Thus, for an example, the Parliament, though by

virtue of entry 81 in List I of the Seventh Schedule is entitled to legislate on interstate migration, such power of legislation cannot be exercised, unless permitted by some saving clause, in contravention of any of the provisions ensuring a fundamental right guaranteed under Part III of the Constitution. Similarly though Parliament has under the entries and Articles mentioned above, power to make laws for implementing any treaty with a foreign country, such law cannot purport to exclude any state territory from India, in contravention of the provisions contained in clause(3) (a) of Art. 1 of the Indian Constitution, by virtue of which every state territory as well as any portion thereof is vested with the status as an integral part of India.

Hence it is quite clear now, that the Parliament has no authority to divest any portion of a state territory of its constitutionally guaranteed status as an integral part of India and obviously any measure directed towards that end will be *ultra vires* the Constitution.

Death is at any time blessed, but it is twice blessed for a warrior who dies for his cause, that is truth."

Justiciability of International Disputes

A Ross-Lauterpacht Controversy

By

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A narrow nihilist might buzz insisting international law to be no better than a compendium of cadaverous codes. But this, indeed, hardly approaches the real truth. Since a long time international law has been set to a salient task. It is a pilgrim to the pantheon of peace and on its way it is ever alert to weed out war in its entirety. But war undoubtedly is never born out of vain vacuum. There must be certain reasons behind to accelerate its apotheosis of annihilation. It is inevitably the international disputes that play this role. If all these naughty disputes can be peacefully settled, war can easily be ostracised. So to ensure the justiciability of all international disputes is to eliminate all elements of war. But all disputes are not justiciable under international law. To assume the justiciability of all international disputes is to oversimplify the entire issue. But at the same time to abandon, on this consideration, all attempts on the line is to drive home a sheer defeatism. Hence efforts have run on many ways and it is one of these attempts that does drag our attention here.

The fact that all international disputes are not justiciable attained a wide recognition in the past. Thus in the past treaties of pacific settlement were conspicuous by the insertion of reservation clauses. In the pre-Hague-Regulations period these reservation clauses were laid down in the shape of some enumerated concrete cases of disputes which

would not be settled by law mainly on account of their non-legal character. But since the First Hague Conference it has been customary to formulate reservation in the shape of principles indicating thereby that there are certain disputes which by their inherent nature are not suitable for law. Thus the post-Hague documents fail to define justiciable disputes in correct details.

We may, however, use four types of approaches to differentiate justiciable disputes (which are usually described as legal disputes) from the non-justiciable (also known as political) ones. In the first place, it may be argued that a legal dispute is what can be settled by current law while a dispute is political where the existing law is inadequate on the point. Secondly, it is said that a legal dispute involves matters of minor and secondary importance while a political dispute relates to matters of major significance. Thirdly, a dispute is legal where settlement by existing international law can ensure a result compatible with justice, but it is political when settlement by current law fails to breed a result that may be able to satisfy our sense of justice and conscience. Fourthly, the opinion runs that a legal dispute always dwells on the plane of rights springing from law while a political dispute reigns in the realm of interest dictated by political motives. Analysis in the line of the first approach has produced the Objective Theory on the justiciability of international disputes.

and the Subjective Theory is an outcome of the remaining three approaches which are intimately linked up with the subjective attitude of the parties.

According to the Objective Theory the character of the controversy as to whether a dispute is legal or political is to be judged by the formal competence of the code. If there be a formal gap in law, i.e. if law be inadequate to cover the case, then surely it is a political dispute. But the Objective Theory is faced with an array of attacks. In the first place, it is alleged to be unscientific and illogical and leading to a fatal admission of weakness on the part of international law. Secondly, it is not in harmony with the unlimited scope of Article 38 of the Statute of International Court of Justice. Further, the critics contend that it is unhistorical because history hardly shows any instance where a court pronounced nonliquet on the ground of objective gap in law.

Arraigned with these most reasonable attacks, the Objective Theory is shorn of its strength so much so that to-day it is condemned as a regrettable relic of those days when international law was the weapon of a barbarous bully. With the Objective Theory thus objected to all our attention is naturally directed to an intimate analysis of the Subjective Theory on the justiciability of international disputes.

While the Objective Theory is leashed to certain objective conditions in the Subjective Theory it is the subjective psychology that matters most. Here the attitude of the parties serves as a pivot whereupon hinges the settlement of the whole issue. Here the basic question is how do the parties formulate their claims or rights. If each of the parties claims its right on the way of law, it is legal. On the other hand, disputes involving clash of interests or clash of interests on political ground are political. Such a

dispute, by its nature, does not yield easily to a legal settlement. It may so involve national honour and interest that settlement by the existing international law fails to ensure a result that might satisfy the sense of equity and justice of the parties involved. Thus according to the Subjective Theory legal disputes have their stand in current law and political disputes have their stand in the change of current law. That is to say in the case of political disputes a change in the existing legal system is aimed at not because the current law is formally inadequate but because it is materially deficient. The Subjective norm thus rests on the concept of material gap in law which means that although there is a law on the point, it is of such a nature as is believed by the parties to be unable to ensure a result compatible with equity and justice. Kelsen reiterates the same when in his *The Law of the United Nations* he says: "The dispute is legal if it is to be decided according to norms of positive law; it is nonlegal i.e. political, if it is to be decided according to other norms, especially according to principles of justice or equity.——If one party justifies its claim or its rejection of the other party's claim by referring to positive law, the dispute is—from the point of view of this party—a legal dispute. If a party justifies its claim or its rejection of the other party's claim by referring not to norms of positive law but to other norms, such as justice or equity, the dispute is—from the point of view of this party—a political dispute."

The Subjective Theory praised as a powerful principle for a pretty long time falls victim to Lauterpacht's three-pronged attack which we can read from the interpreting quill of Ross.

Firstly, it is alleged by Lauterpacht, as Ross lets us know, that the Subjective Theory

puts too high a premium on the arbitrary will of the parties and gives rise to a fatal gap in law. Thus the Theory assumes a very dangerous form as it unhesitatingly invites an arbitrary evasion of legal settlement. Indeed, it is by no means the nature of the dispute itself that proves it unfit for any legal settlement; it is rather the reluctance of the parties themselves to secure a legal settlement that invariably renders the dispute unsuitable for any legal settlement.

Secondly, Lauterpacht fails to tolerate the Subjective Theory as it gives indulgence to the conflicts of interests and acknowledges the impossibility of having a judicial settlement in all cases. He forcefully argues, writes Ross, that international law as true law must always ignore conflict of interests and must demand a judicial settlement in all cases.

Thirdly, Ross informs that ridiculing the Subjective Theory Lauterpacht opines that much of the modern conflict of interests would be solved if the courts were allowed to decide cases *ex aequo et bono* in a greater degree.

Now Ross is an ally of Lauterpacht only so long as he patiently presents a version of Lauterpacht's arguments. But beyond that he is no longer at amity with Lauterpacht as he comes to be a very hostile critic of the aforesaid allegations of Lauterpacht.

Ross argues that according to the Subjective Theory a dispute may be withdrawn from the jurisdiction of the court only when it is proved to be a political dispute and withal unable to be settled by current law. Thus Ross admits that a state may refuse the jurisdiction of the court point-blank; but at the same time he withstands Lauterpacht with his firm belief that the Subjective Theory will never impel an arbitrary evasion of legal settlement. He argues that in order to withdraw a dispute on ground of its poli-

tical character a state must admit the validity and legality of the opponent's arguments. Because while the dispute is withdrawn on ground of its political nature the legality and validity of the opponent's arguments remain unaffected; so in a sense this legality may be said to have been accepted by the party withdrawing the dispute. Thus with the aid of the Subjective Theory there can be an arbitrary evasion of legal settlement only when the state so evading admits the validity of the opponent's legal argument. But the dictates of common sense will teach us well that the state in consideration will never do that as, in effect, it will be baneful to its own interest. In this way Ross proves that the attempt at evasion through the Subjective Theory, as alleged by Lauterpacht, will breed a double-horned dilemma which is highly disturbing.

We must admit, however, that from the standpoint of expediency and practical wisdom the assumption of Ross is quite apposite. States will certainly act in the way as surmised by Ross. But before acclaiming Ross we must be aware of a fundamental difference between two propositions namely—that a state fails to withdraw a case from the jurisdiction of court on account of law and that it desists from doing so guided by expediency. Ross, no doubt, prefers the second proposition to substantiate his stand. Thus, according to Ross, allegiance to law completely rests on considerations of expediency. But it is scarcely discreet to rely on expediency in order to elicit obedience to law. Occasions of expediency are always accidental. So expediency as the basis of allegiance to law can never be called a scientific norm. Hence the argument of Ross is not so sound as it seemingly appears to be. Thus Subjective Theory may not always lead to an arbitrary evasion of legal settlement, but it will not be unreasonable to apprehend its incidental occurrence.

Coming next to the second charge of Lauterpacht, Ross lances him with a much more rigorous retort. He readily reads in Lauterpacht's demand a purely utopian note. He even goes so far as to accuse Lauterpacht of extravagant idealism. Saturated with the brag of a practical thinker Ross harps that to assume, like Lauterpacht, the possibility of compulsory legal settlement in all instances is to cherish a far-flung fascination for a fool's paradise. But in our opinion Ross here deduces his conclusion in a very hot haste and that's why he has naturally been guilty of a serious misreading of Lauterpacht. In his version Lauterpacht is believed to have emphasised that international law must demand a compulsory legal settlement of all disputes. But any careful autopsy will reveal that what Lauterpacht has demanded is not the compulsory legal settlement of all disputes, but only the compulsory pacific settlement of all disputes. Lauterpacht is quite reasonable to confess that the demand of a compulsory legal settlement of all disputes is peculiarly premature at a time when the obligation to settle the contested disputes is still absent. Thus in challenging Lauterpacht on this point, Ross himself sails a faulty float which instead of discrediting Lauterpacht drowns his own reputation.

With regard to the third charge of Lauterpacht, Ross points out that the disputing states will not be willing to refer important political controversies to the court to be settled by a small circle of judges (i.e. *ex aequo et bono*) who may be experts in legal principles but may not have the necessary degree of insight enriched by political wisdom. But this charge of Ross may be re-

futed with the argument that these judges may be assisted by an additional body of experts equipped with a comprehensive political knowledge.

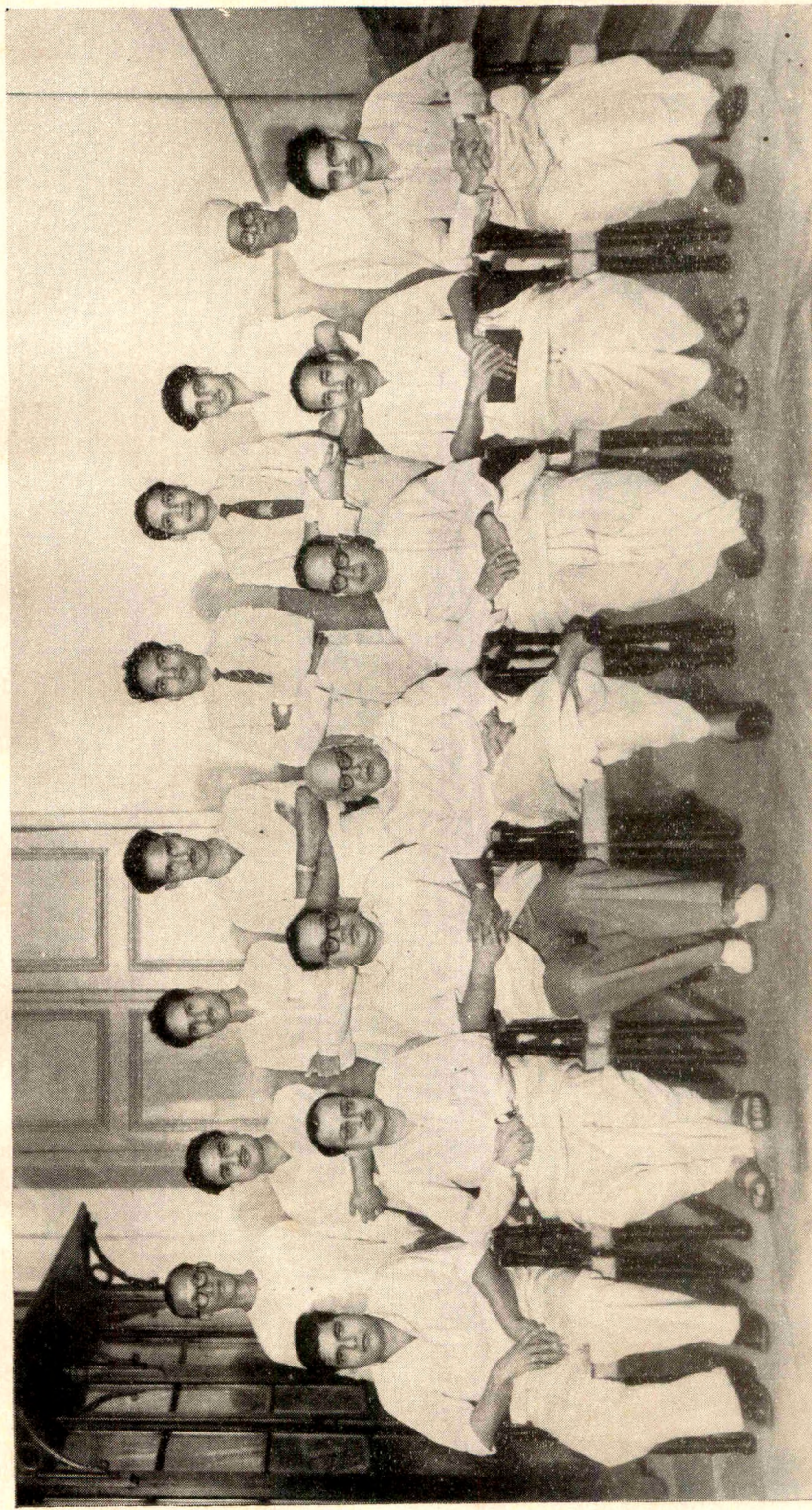
In this way the controversy between Lauterpacht and Ross runs unceasing without having a concrete solution of the whole issue. If we like to carry it on, we can go as far as we like; but that long-drawn game will ultimately end as a fruitless fun. We, however, want to emphasise that a distinction has always been drawn and, even to say, it must be drawn between legal and political disputes. It is the muddle of the two that engenders numerous misconceptions. Even the U. N. Charter has not failed to draw a demarcating line between legal and political disputes. The Statute of International Court of Justice too does attempt the same. The legal aspect of the international dispute may be settled by international law, but not the political dispute. So Subjective Theory is even there to-day as political controversy is still too real to be wiped off. In fact, international law to-day is baffled with a basic problem. Though it is a dynamic code, yet it cannot always be reshaped on the basis of political justice. Unless the necessary alterations be introduced, material gaps in international law must be there. Hence so long as no machinery is designed to adjust international law to the needs of political justice the Subjective Theory must always be there to whet complications and it is useless to imagine any easy escape.

* For the preparation of this Article the writer is in deep debt to his revered Professor Sri Subimal Kumar Mukherjee of Calcutta University.

OURSELVES

UNIVERSITY COLLEGE OF LAW UNION—CALCUTTA

MEMBERS OF THE WORKING COMMITTEE—1958-59



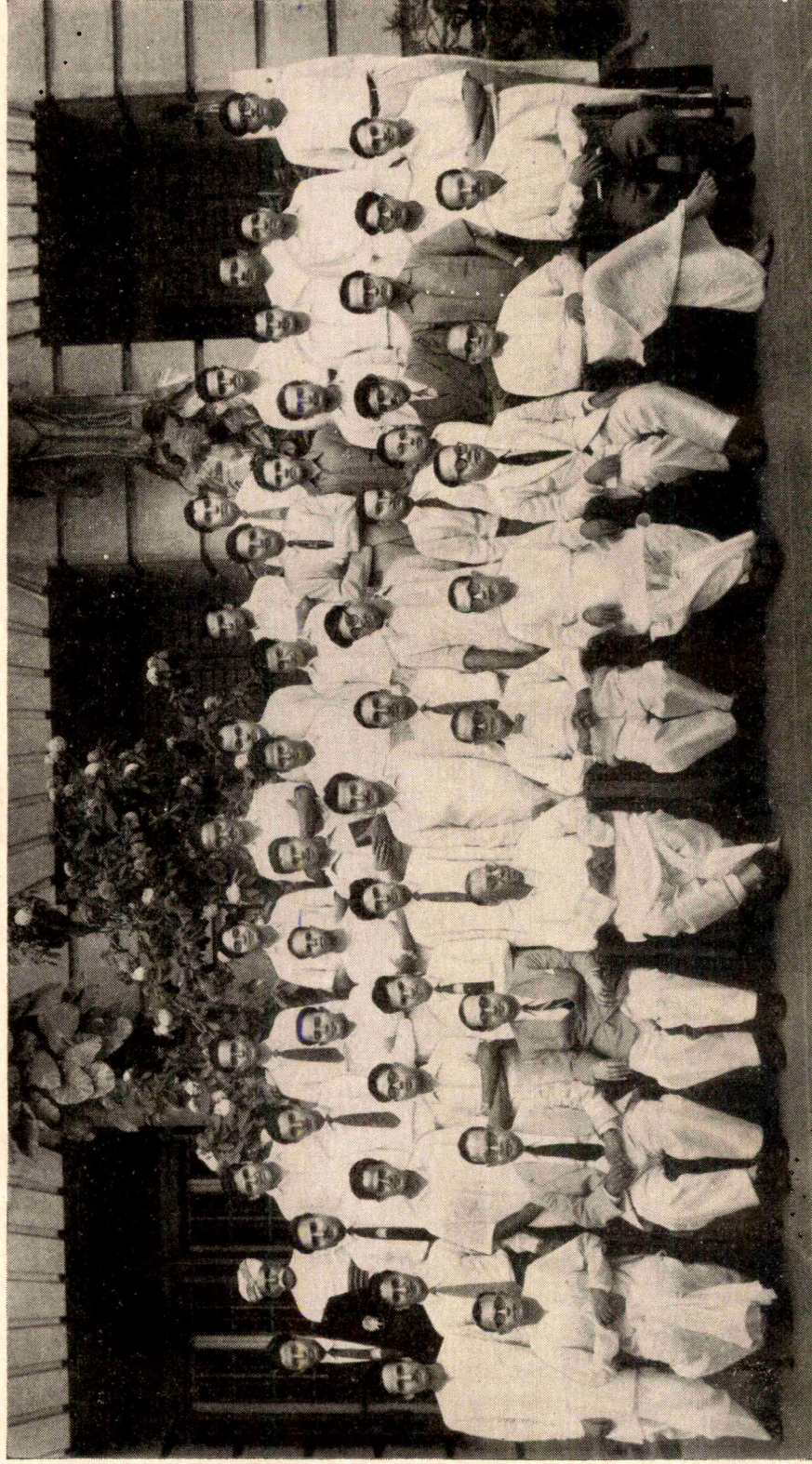
Sitting (L to R)—Giridhar Mukherjee (Asst. Genl. Secretary), Dr. P. C. Chunder (Vice-President and Editor-in-Chief), Prof. S. A. Masud (President), Dr. P. N. Banerjee (Principal), Prof. S. N. Mukherjee (Vice-President), Sunil Banik (Genl. Secretary), Sampatmal Kathotia (Asst. Genl. Secretary, Office & Accounts),
 Standing (L to R)—Bijan Chakraborty (Seniormost Assistant), Himadri Lahiri (Jt. Secretary, Drama and Social), Pares Deb (Jt. Secretary, Debates), Madhusudan Majumdar (Jt. Secretary and Editor, Magazine), Satrudhina Prasad (Jt. Secretary, Drama & Social), Shyamsunder Patodia (Jt. Secretary, Aid Fund), Shyamsunder Agarwala (Jt. Secretary and Editor, Magazine), Gonouri Ram (Peon).

Absentees— Prof. Sunil Mitra (Vice-President) and Sri Barin Roy.

UNIVERSITY COLLEGE OF LAW UNION-CALCUTTA

MEMBERS OF THE CENTRAL COUNCIL—1958-59

GOLDEN JUBILEE YEAR



Sitting (L to R)—A. C. Karcoon, Prof. S. N. Mukherjee (Vice-President), Prof. S. K. Mitra (Vice-President), Prof. S. C. Ghosh (Treasurer), Prof. N. K. Siddhanta (Vice-Chancellor), Sri D. Chakraborty (Registrar), Prof. S. A. Masud (President), Sri M. Basu (Surdt.), Sri S. K. Banik (Gen. Secy.).
 Standing (L to R) 1st Row—P. Deb, N. Asarwala, A. Pal, S. Gupta, B. Deb, D. Das, R. K. Dutta Chowdhury, R. P. Sinha, B. B. Chatterjee, Janardan, S. S. Poddar, S. S. Agrawal, A. K. Chhajer, S. Sarkar, A. Saha.
 2nd Row—A. Mukherjee, H. Lahiri, P. Ganguli, B. Chanda, J. K. Acharya Chowdhury, D. Bag, B. Sarkar, D. Mookerjee, S. Prasad, S. M. Kathotia (Asst. Gen. Secy.), K. Banerjee, G. Bhattacharya, S. S. Patodia, D. Chakraborty.
 3rd Row—Biltu (Bearer), G. Mukherjee (Asst. Gen. Secy.), B. Roy, P. Chakraborty, M. Majumdar, S. Bose, D. Chakraborty, A. Sarawgi, B. Das, T. Sen.

Report of General Secretary

1958-59

Fifty years have passed since the birth of our College and we are exceptionally lucky to celebrate the Golden Jubilee of the College. For celebrating the Golden Jubilee among the students, we submitted a scheme to the authorities concerned, but for reasons not known it was not implemented.

I shall not endeavour to make a detailed report of the activities of the Union as the reports of the Secretaries of other departments have been published in this journal.

The Union organised a grand reception and impressive get-together to our first year students, by observing a Freshers' Social where Sri Asoke Sen, Union Minister of Law, was the Guest-in-Chief.

Our College took part in the Inter-collegiate one-act-drama competition in Bengali, Hindi and English. In drama and music, we also competed on the all-University level with success. The annual dramas staged by our students also were very much enjoyed.

This year also the Union published question papers of past years and distributed among the students free of cost. We also sold a large number of khatas, papers, ink and pens at the cheap rate to the students. We disbursed nearly Rs. 4,800/- to some 400 needy students from the Students' Aid Fund. This time the Union also purchased law books to the extent of Rs. 350/- to expand and enrich the Aid-Book-Library. It may be noted that the College Union raised Rs. 200/- from the students and the staff and gave that amount as a token help to an old German tourist, who incidentally came to our College for help.

For the mutual exchange of ideas, for mutual appreciation of each other's problems, the Union has inaugurated an Ex-students' Association, which will help the new generation of the legal profession. The Re-Union functions were celebrated with great success and about 2,000 students and guests were entertained with music and refreshment.

This year large number of foreign students' representatives were received by the Union. Delegates from U.S.A., West Germany, Israel, Australia, Ceylon, China, delegations from the COSEC-ISC, World University Service and others were received. Such cultural contacts in the student community establish a better understanding and fraternity among students.

Now coming to the sphere of debates and moot-court competitions, we can claim that it is a record year of activities. We organised several debates, recitation competitions, inter-section moot-court and Dr. B. Ray Chowdhury Memorial Moot-court competitions. The College won several All-India Championship trophies and

the Inter-collegiate Championship trophies in debates and many other individual, gold and silver medals and cups. In this year we tried to revive the All-India-Asutosh Trophy Debate Competition after long seventeen years. But in spite of our three months' persistent efforts the Competition could not take place on account of inadequate number of entries from the Universities outside West Bengal.

As usual the Legal Conference was also attended by eminent lawyers of the Calcutta High Court. This year the Union introduced the participation of students in the same, which was acclaimed by all and even appreciated by Sri S. R. Dasgupta, the Hon'ble Chief Justice of Mysore, who presided over the Conference.

As our Magazine includes articles from eminent lawyers, jurists and judges on different important legal topics, it has been decided to name it as "Law Journal" from this year.

Both in the local as well as in the National Students Affairs we have always stressed upon the idea of closing up in ranks for a happy and integrated student-life. This Union was an active member of the Action-committee of the Anti-fee-increase movement in Calcutta. This Union is also a member of the Action Committee for the removal of shops from the University premises. This Union has also tried for an integrated N.U.S. in Bengal and in India and to achieve the same it actively participated in some meetings at Calcutta, Delhi, Nagpur, Madras and other places. The General Secretary of the Union also represented the Calcutta University in the South-East Asian Conference of the World University Service (Geneva). The World University Service is working for the co-operative and self-help technique in the University community, by breaking up the constricted circle of the old traditional student movement.

Friends, we must not, in the process of building students' unity, sow the seeds of disunity of intolerance and dogmatism. It is for you to come forward, take up the responsibilities and to strengthen the democratic forces of the Union. No words can express our gratitude for the tremendous co-operation, which we have got from the members of the College Council and the students.

We must express our deep gratitude to our beloved Principal Dr. P. N. Banerjee for his guidance and advice. We also thank our Vice-Principal Dr. B. N. Mukherjee and Professor S. A. Masud, President of the Union, for their keen interest in the Union activities. We also thank our Vice-Presidents, Dr. P. C. Chunder, Professor S. K. Mitra and Professor Samar Mukherjee for their co-operation to make the Union functions a success. We should also feel it a pleasure to thank Sri M. Basu, Superintendent of the College and other members of the office staff for their active and hearty co-operation in all our activities.

The Union again greets you all, in the name of "love, tolerance and friendship". Long live students' unity.

Sunil Kanti Banik,
General Secretary.

Report from the Secretary of Students' Aid Fund

Students' Aid Fund :

A large number of applications were received from the students seeking aid from Students' Aid Fund. Though the amount at our disposal was not very adequate, considering the number of applicants, we did our best to serve them all. In view of large number of applications, individual interview was not possible, yet we took every care in scrutinizing the applications for selecting the needy and deserving students for the grant. In this respect, I must express my deep sense of gratitude to the President of our Union, Prof S. A. Masud for giving his valuable time in disposing of the applications. 158 applicants were given aid as per details given below:

1st Year—Total award to 84 students @ Rs. 24 -	..	Rs. 2,016.00
2nd Year—Total award to 37 students @ Rs. 36 -	..	Rs. 1,332.00
3rd Year—Total award to 37 students @ Rs. 36 -	..	Rs. 1,332.00
		Rs. 4,680.00

Students' Aid Fund Library :

A large number of students were benefited by borrowing books from the Students' Aid Fund Library of the Union. This is one of the important sections of the activities of the Union for the welfare of the students.

Cheap Store :

Besides the above two activities, the most important work entrusted to this Department was running of Cheap Store and printing of University Question Papers in Booklet form. We are proud to state that this year we ran Cheap Store very successfully for the benefit of the mass students. We can claim it as the cheapest store in Calcutta. A record sale of exercise books of different sizes, inks, fountain pens, was made. Since the Calcutta University introduced new syllabus for Law courses, we had to face some difficulties in printing of question papers; but with the efforts of my colleagues, we were successful to bring out the question papers in time and distributed to the students in general free of cost. These efforts were highly appreciated by the students and the Professors alike. The question papers were printed according to the new syllabus of the University. In this respect I must mention the names of my colleagues, Sri S. S. Agarwal, S. S. Dhanuka, N. S. Bothra and Manikchand Khast, who always rendered valuable service to this Department.

Lastly, I must also thank the President of our Union, Secretary Sri Sunil Banik and Asst. Secretaries Messrs. S. Kathotia and Giridhar Mukherjee and all other Executive Members for their valuable guidance and co-operation.

Bijoy Das (Retired)

Shyam Sundar Patodia

Jt. Secretaries, Students' Aid Fund

Report—Re-union

The Annual Re-Union of the past and the present students of the University College of Law was solemnised most successfully and enthusiastically this year in the open quardangle in front of the Asutosh Buildings. Our revered Principal Dr. P. N. Banerjee presided over the function and Professor Nirmal Kumar Sidhanta the Vice-Chancellor of the University of Calcutta, was pleased to be the Guest-in-Chief.

The ceremony was followed by a cultural function which included amongst many eminent artists, Sri Satinath Mukherjee, Sri Manab Mukherjee, Sm. Utpala Sen and Miss Gayatri Bose.

Arrangement for light refreshment was also made for the students, staff as well as the guests.

The ceremony witnessed the long-cherished inauguration by Dr. P. N. Banerjee of a permanent Ex-students Association with Dr. P. C. Chunder as its first Chairman. The object of the Association is not only to maintain a close and cordial relation between the existing and the out-going students of this College but also to endeavour for the manifestation of the latest talents of its members in the intellectual field.

In conclusion, I take this opportunity of expressing my deep sense of gratitude to all for their unstinted cooperation to make the function a success.

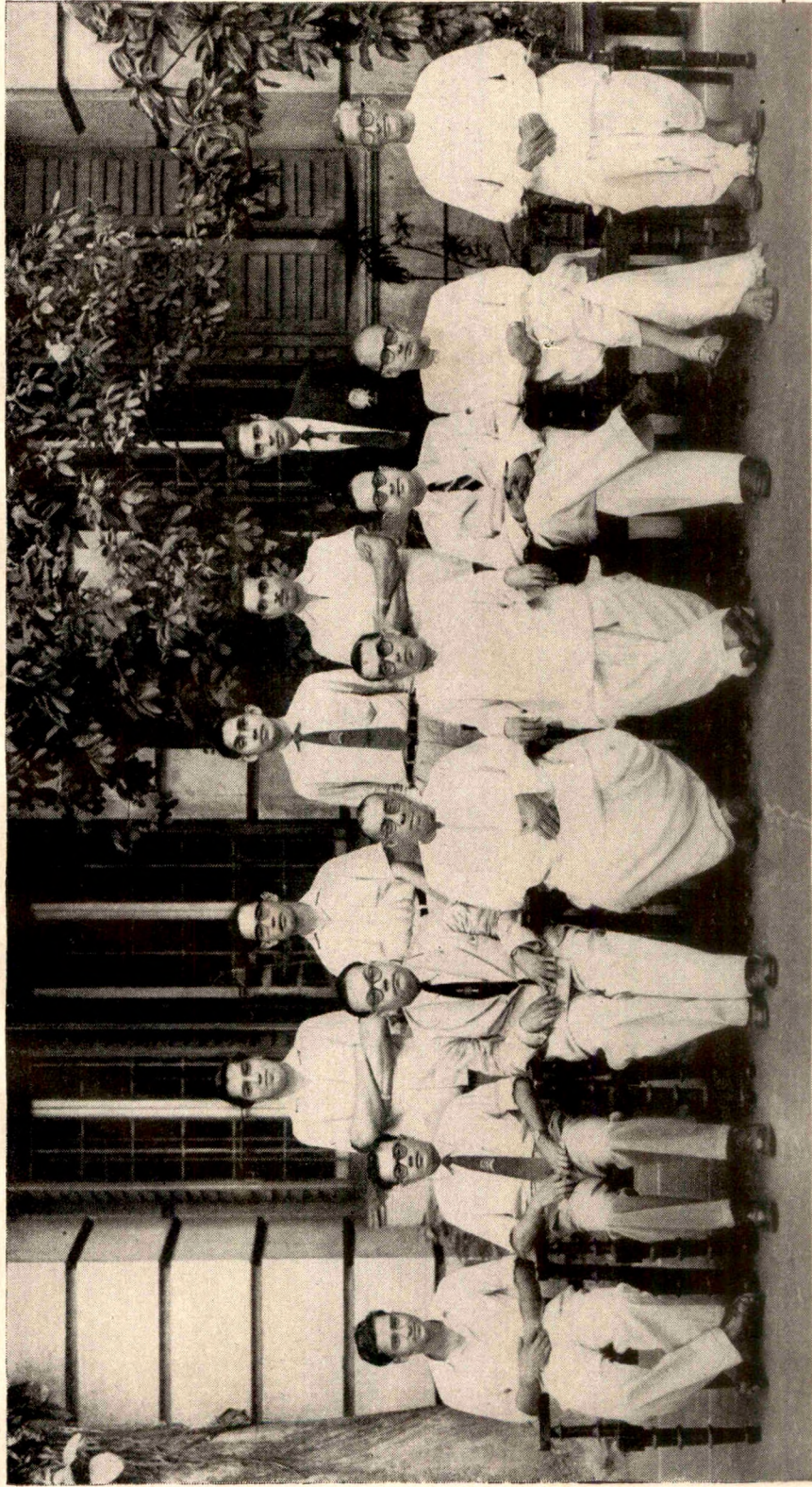
Barindra Nath Ray

Secretary for Re-Union

- (1) Mrs. Chandrima Roy
- (2) Miss Aloka Bhose
- (3) Sri Sib Shankar Sarkar
- (4) Sri Dilip Das

UNIVERSITY COLLEGE OF LAW ATHLETIC CLUB—CALCUTTA

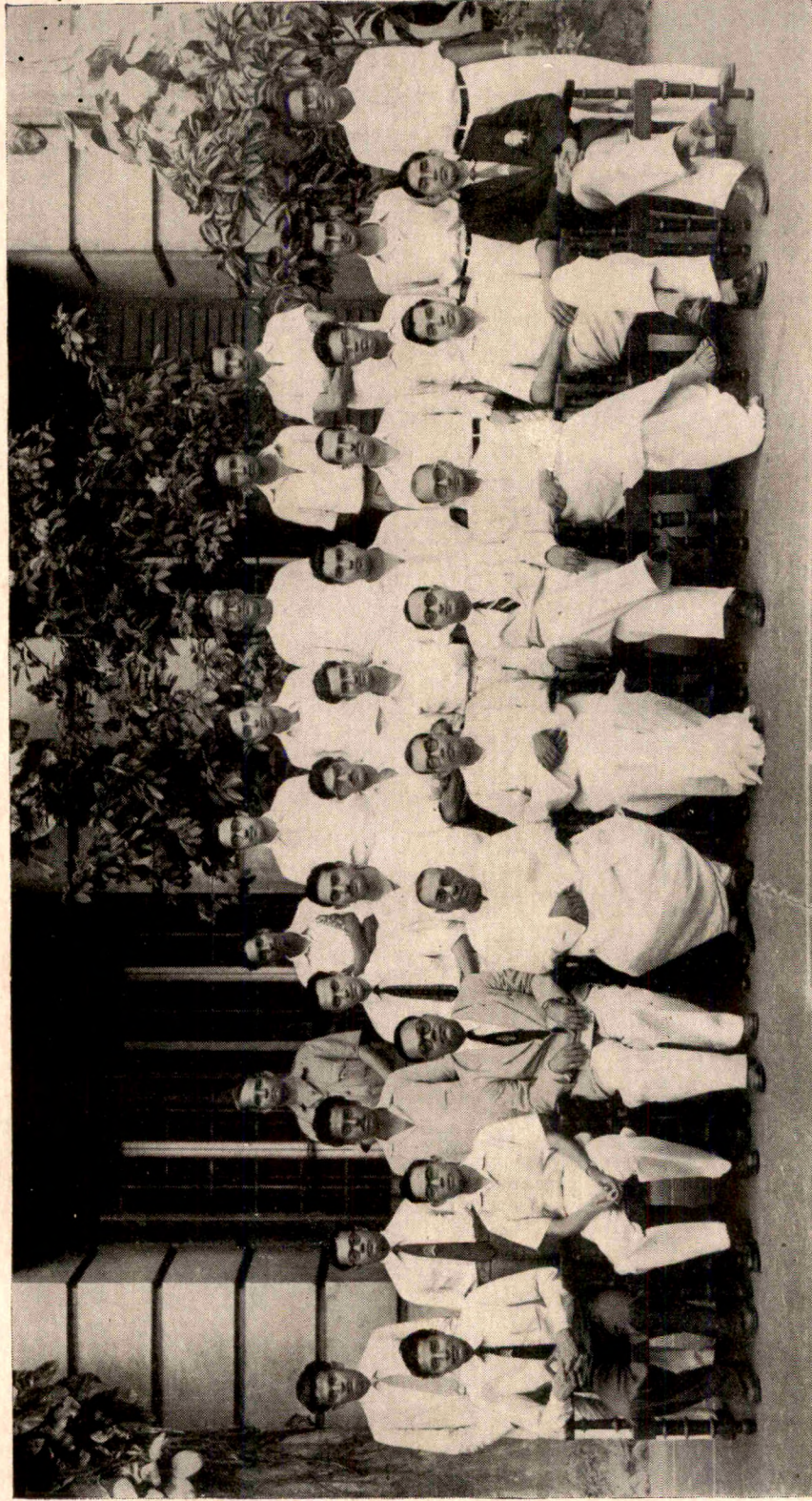
WORKING COMMITTEE—1958-59



Standing (L to R)—Atma Ram Sarangi (Secretary-in-Charge), D. T. Bhutia (Hockey Captain and Member), Soumen Ghosh (Volley Ball Captain and Member), Sanjib Banerjee (Member), Aditya Mukherjee (Gymnasium Secretary),
 Sitting on Chairs (L to R)—Tapan Dutta (Cricket Captain and Member), Mahboob Rehman (Member), Prof. Syed Ahmed Masud (President), Prof. Satish Chandra Ghosh (Treasurer, C.U.), Dr. Dukhoharan Chakravorty (Registrar, C.U.), Prof. Sunil Mitra (Vice-President), Mrityunjoy Basu (Superintendent), Bijan Chakravorty (College Staff).

UNIVERSITY COLLEGE OF LAW ATHLETIC CLUB—CALCUTTA

CENTRAL COUNCIL—1958-59

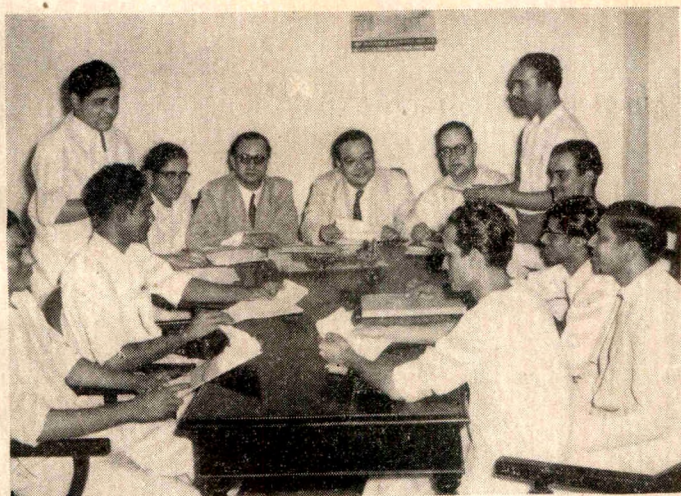
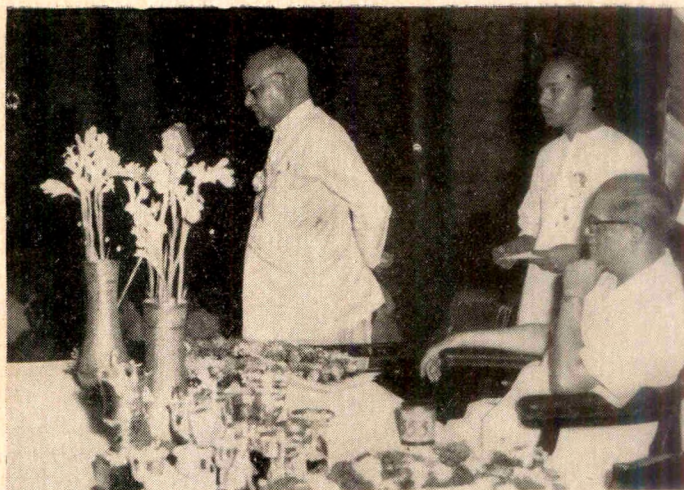


Sitting (L to R)—Aditya Mukherjee (Gymnasium Secretary), D. T. Bhutia, Prof. S. A. Masud (President), Prof. S. C. Ghosh (Treasurer, C.U.), Dr. D. Chakravorty (Registrar, C.U.), Prof. S. K. Mitra (Vice-President), M. Basu (Superintendent), Atma Ram Sarangi (Secretary-in-Charge), Soumen Ghosh.

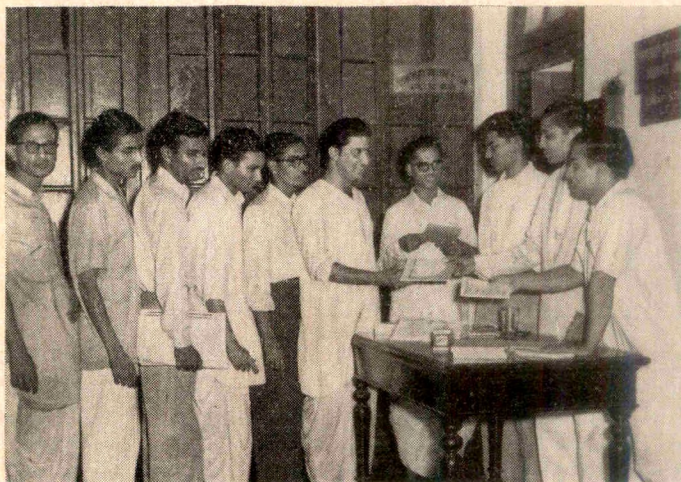
Standing 1st Row (L to R)—Shiv Sankar Choudhury, Mahaboober Rehman, Animesh Das, Dol Govind Banerjee, Madhukar Dave, Rama Das Bose, Tapan Dutta, Sri Bose, Sri Pandey, Sankar Paul, Badal Mukherjee, Dilip Kumar Chakravorty.

Standing 2nd Row (L to R)—Parasuram (Bearer), Sambhu Charan Ghosh, Prabir Sarangi, Sukumar Sinha, Bijon Chakravorty, Narendra Nath Nag, Sanjib Banerjee

Principal Sri P. N. Banerjee is addressing the "Re-Union Function"—where Sri N. K. Siddhanta was the Guest-in-Chief

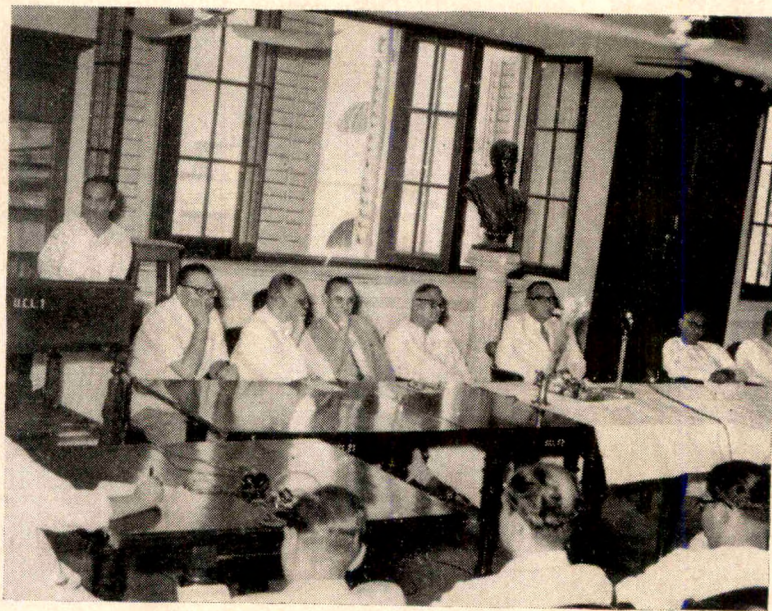
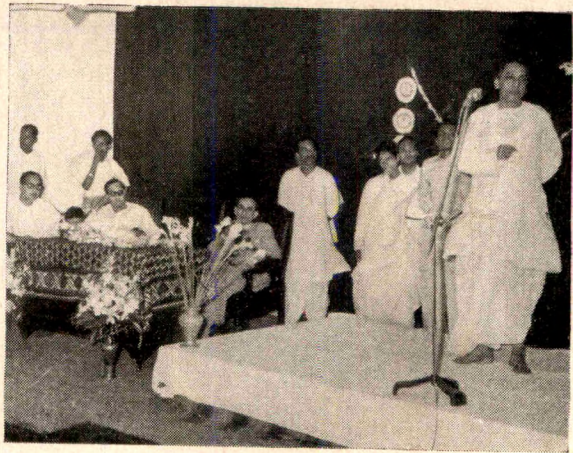


Executive Committee in action



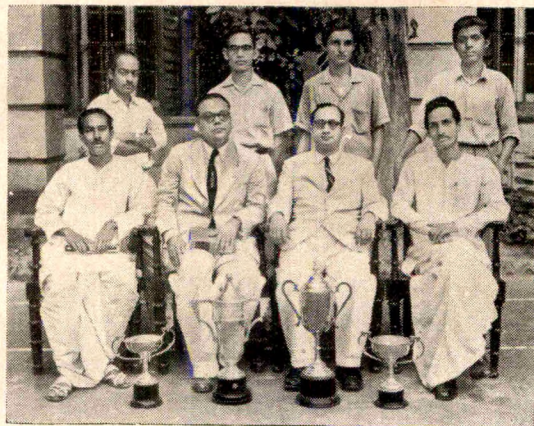
Our Cheap Store

Freshers' Welcome—Sri Asoke Sen, Union Law Minister, is addressing, —Vice-Principal Dr. B. N. Mukherjee (sitting extreme right) presided.



'Annual Legal Conference'—Where Mr. Justice S. R. Das Gupta was Guest-in-Chief and Vice-Principal Dr. B. N. Mukherjee presided.

Our College Debate team—Standing (L. to R.)—Sri Anil Mukherjee, Sri D. T. Bhutia, Sri Pranab Ganguly, Sri Biplab Das Gupta, Absentees—Sri Mihir Sen, Sri Dinesh Goswami, Sri C. Rustomji.



Our Athletic Club

1958-59

The Athletic season started with football under the skipper'ship of Chuni Goswamy, Indian Olympic star. However, due to his frequent absence, for instance he led the Indian Universities team to Kabul, Animesh Das was elected Captain in his place. In both the Inter-collegiate League as well as the knock-out, our football team this year put up a very good show. In early October our football team left for Jalpaiguri to play in a local tournament. We started well but due to injuries we could not go beyond the semi-final. Our players were however fortunate to get the opportunity of visiting Darjeeling on the return journey. The short trip to Darjeeling was greatly appreciated by all. We also participated in a football tournament held at Bagnan. We reached the final without any difficulty, but on that day due to sheer bad luck we lost by a solitary goal much against the run of play. We were awarded the Runners-up Trophy. Special mention must be made of Purnendu Sen, Paritosh Sen, S. P. Sinha and Animesh Das for their outstanding performance during the season.

The College Cricket team led by Tapan Dutta, four times Ranji Trophy player, put up a splendid performance in the Inter-collegiate League with the result that we moved up to the finals. In the finals, however, due to an impression that the date of the match had been postponed we did not field our side with the result that the Vidyasagar Challenge Shield was awarded to our opponents. The incident was truly unfortunate and the arbitrary action of the C. U. Sports Board left much to be desired. Our Cricket team this year contained many outstanding players of whom mention may be made of Tapan Dutta, Gopal Chakravarty and Rajen Sanyal who played in the Ranji Trophy matches, and Salil Banerjee, Chuni Goswamy and Sham Sunder Mitra who played in the Inter-University matches. Salil Banerjee had the additional honour of leading the Calcutta University Cricket team.

In hockey this year we played an unusual number of friendly matches both inside as well as outside Calcutta. At the very beginning of the hockey season we made an enjoyable trip to Kharagpur to play with the Indian Institute of Technology. The exciting match ended in a draw. We must record our deep sense of gratitude for the warm hospitality extended to us by the students of the I. I. T. Another trip which we enjoyed was the trip to Serampore to play against Serampore College. The trip in the electric train was short and pleasant and the welcome we received was warm and hospitable. This match we ended in a draw. In the Inter-collegiate League as well as the knock-out our team fared quite well and although we could not carry any trophy yet we never went down tamely without a fight. The hockey team was led by D. T. Bhutia, Captain for two consecutive years, and consisted of Tapan Raychoudhury, Calcutta University

Blue, N. N. Nag, K. Swarup, Ramadas Basu, M. W. Dutton, J. P. Moktan, S. Mullick, L. Mukherjee, Bisweswar Burman, P. Dutta, Tapan Bir, A. Guha and A. Chakravartty. Hockey Blues were awarded to D. T. Bhutia, N. N. Nag and J. P. Moktan.

Under the captaincy of Asoke Neogy the Badminton tournament this year was a great success. We congratulate R. P. Chatterjee, men's singles winner, Sm. Jharna Bhar, Women's singles winner, and Krishna Gopal Baldi and Mukti Ranjan Barooah men's Doubles winners. In Tennis this year the College team was led by P. Sahana and consisted of P. Sahana and Asoke Neogy. The Table Tennis team was led by Santi Chatterjee.

The Annual Sports were held on the 1st of March 1959 and was presided over by our Vice-Principal Dr. B. N. Mukherjee. Justice P. N. Mukherjee was the Chief Guest and Professor S. A. Masud, President of the Athletic Club, gave away the prizes. The high light of the day was the releasing of white pigeons by Dr. B. N. Mukherjee. Among the many novel features introduced this year the one which evoked most admiration was the beautiful brochure. The Individual Championship Trophies for men was won by Bisweswar Burman and for women by Ratna Banerjee.

The College team which crowned itself with the greatest amount of laurels was the Volley-ball team led by Soumen Ghosh. For the first time in the history of our College we won the Inter-collegiate Volley-ball Knock-out Tournament organised by the C. U. Sports Board. The team consisted of Soumen Ghosh (Captain), Atul Chanda (who represented India at Bukharest), Samir Ghosh (Bengal), Dilip Bhattacharjee (Bengal), P. Moulik, Ashraf Ali, N. Surma, Dilip Chakravarty, O. P. Jalan and A. K. Pradhan.

In conclusion we would like to thank our beloved Principal, Dr. P. N. Banerjee, our Vice-Principal Dr. B. N. Mukherjee, and the President of the Athletic Club Professor S. A. Masud, for their guidance. We would also like to thank Sri Mrityunjoy Prosad Basu (Superintendent of the College) and Sri Sribhusan Mitra for their kind co-operation.

Biren Chatterjee
Secretary.

D. T. Bhutia
Acting Secretary.



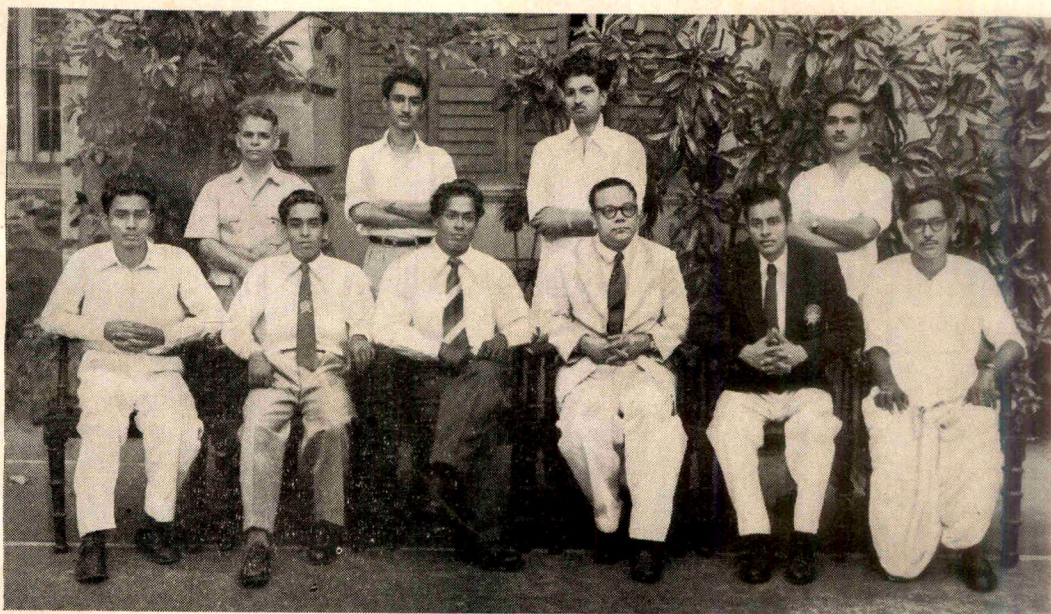
UNIVERSITY COLLEGE OF LAW

GYMNASIUM

1958-59



Standing (From left to right): P. G. Student, Prabir Kumar Ghosh, Hrisikesh Roy, P. G. Student, Barindra Gopal Roy, P. G. Student, Sankar Mukhopadhyaya, Mrinal Kanti Mitra, P. G. Student, Parasuram (Bearer).
Sitting (From left to right): Durgadas Roy, Prof. Pratap Chunder, Prof. S. A. Masud, Principal P. N. Banerjee, Prof. Samarendra Nath Mookherjee, Dilip Chakravarty, Dharendra Nath Das.



Sitting (left to right): J. Bakshi, Gokul Neogi, Manotosh Roy (Physical Instructor), Prof. S. A. Masud (President), Aditya Mukherjee (Secretary), Dilip Chakrabarty.
Standing (left to right): Parasuram, Badal Mukherjee, Basudev Dutta, Biswanath Mukherjee

CALCUTTA UNIVERSITY COLLEGE OF LAW

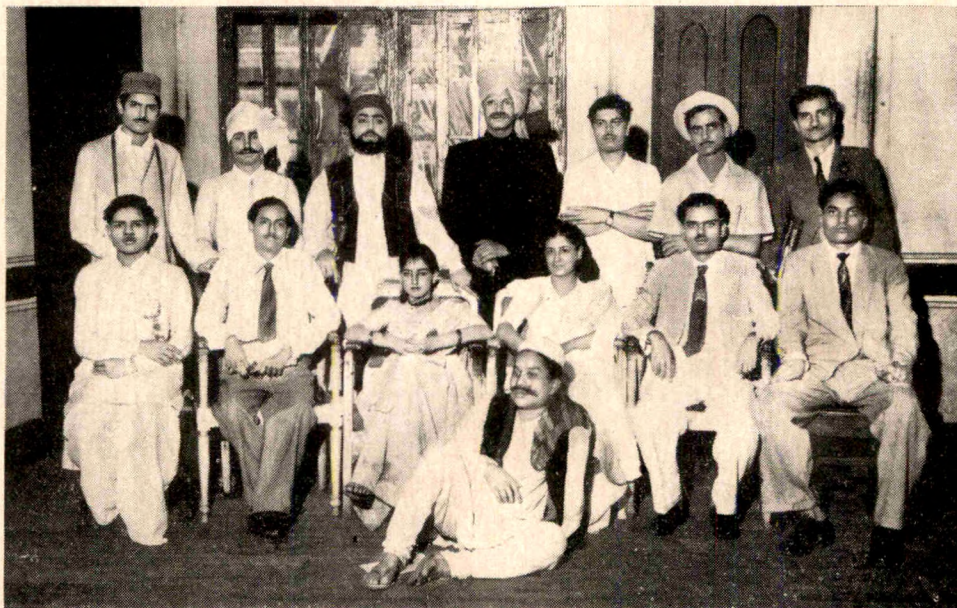
ANNUAL BENGALI DRAMA "DURABHASINI"



Sitting (L to R)—Manisha Seal (Sumita), Lali Mukherjee (Bina), Deboprasad Mukherjee (Director & Girin), Himadri Lahiri (Drama Secy.), Prof. S. A. Masud (Union President), Sunil Banik (Gen. Secy.), Alakananda Bhose (Ramala), Bithika Mukherjee (Lata & Katyayani).

Standing (L to R)—Amar Banerjee (Benoy), Nemai Kar (Mahesh), Malay Bose (Kalyan), Shyamadas Ganguly (One friend), Prasanta Bhattacharya (Bimal), Biswajit Ghosh (Music Director), Bijon Chatterjee (Kirtimoy), Prasanta Gayen (Mrinmoy), Samar Nag (Promter), Sunil Biswas (Nakul), Bijoy Das (Prompter).

ANNUAL HINDI DRAMA "ULJHAN"



Standing (L to R)—Mr. S. N. Kapoor, Mr. Beni Prosad Sharma, Mr. G. D. Mehrotra, Mr. Radha Kishan Bubna, Mr. Lakshmi Narayan Tandon, Mr. Chandra Kumar Gupta, Mr. Jadu Prasad Singhi (Stage Management.)

Sitting on chair (L to R)—Mr. Sampatlal Kathotia (Asstt. Gen Secy.), Mr. Zahir Ahmed (Director), Miss Janki, Mrs. Kumar, Mr. Hanumanprasad Pachisia (Convenor), Mr. Shatrughan Prasad (Secy. Social and Drama).

Sitting on the front—Mr. Kashi Prasad Agarwal.

Report

SOCIAL AND DRAMA

In the cultural and extra curricular activities, we students did not lack behind. Our activities began with the three One Act Dramas (in Hindi—"Sakahari", in Bengali—"Sandhya Sat-ta", in English—"Thread & Scarlet") in the inter-collegiate drama competition organised by the Calcutta University Institute. The Hindi Drama was directed by our fellow student Shri R. K. Khanna. This one was superb in its character and was highly appreciated by the audience.

The Bengali Drama written by our College student Sri Prasanta Gayen directed by Shri Prasanta Chakravorty, the Ex-Joint Secretary, Social & Drama gave an excellent impression upon the judges and got the certificate of merits.

The English Drama directed by Shri Tarak Nath Banerjee, one of our fellow students and advised by our Vice-Principal, Dr. B. N. Mukherjee, charmed the spectators which kept the audience spell-bound and stood second in the competition.

We welcomed the new students with "Freshers-social." It is a remarkable feature of our College Union to establish friendly relations among the students, present and the new-comers. Our honourable Law Minister Mr. A. K. Sen graced the occasion with his kind presence as Guest-in-chief. The function which included variety performances was no doubt a success as a whole. We are grateful to the organisers and the patrons. We had also organised an "Annual Bengali Recitation Competition" which aroused a great enthusiasm among the students.

The last and the latest function of this department was the staging of two dramas on Board the 'Rangmahal' on 28th and 29th March, 1959, the Hindi Drama 'ULJHAN' by Ramesh Mehta directed by Mr. Zakir Ahamad and 'DURBHASINI' by Narendra Nath Mitra directed by Deba Prasad Mukherjee.

This year our department achieved another success by publishing a souvenir, which was an excellent one.

Before we conclude, we shall be failing in our duty if we do not thank our Committee Members, patrons and the advertisers in the Souvenir and every body who helped us in maintaining so proud an office by their valuable guidance, untiring help and the most hearty co-operation.

Prasanta Chakravarty
(Retired)
Shatrughan Prasad
Himadri Lahiri
Joint-Secretaries

Social and Drama Sub-Committee :

1. Sri Ram Krishna Paul
2. „ G. D. Malhotra
3. „ Lakshmi Narayan Tandan
4. „ Hanuman Prasad Pachisia
5. „ Prasant Gayan
6. „ Samar Gupta
7. Miss Lali Mukherjee
8. Sri Tarak Nath Banerjee

Report DEBATE

The University College of Law Debate Seminar has shown greater activity and enthusiasm than those recorded in the immediate past. The number as well as the quality of the Debates organised by the Seminar have received wide recognition. It is hoped that it will serve as an encouraging example to the successor in the office of the Debate Secretary. The details of the competition held and prizes won as well as the particulars of the very interesting Exhibition Debate and Moot Court Competition organised by the Seminar are given below:

1. Runners-up Trophy—National Medical College, Calcutta.
 1. Sri Chandra Nath Chatterjee
 2. Sri Anil Mukherjee
2. Championship Trophy—Calcutta University Institute (Inter-Varsity).
 1. Sri Chandra Nath Chatterjee
 2. Sri Subhas Bose
3. Championship Trophy—Behrampur (All-India).
English Team—
 1. Sri Dinesh Goswami
 2. Sri Pranab Ganguly
Bengali Team—
 1. Sri Asoke Ghose
 2. Sri Biplab Dasgupta
4. Individual Prizes at Behrampur:
Gold Medal—
 1. Sri Dinesh Goswami
 2. Sri Asoke Ghose

5. Netaji Subhas Debate Competition:

First Prize—

Sri D. T. Bhutia

6. Runners-up Trophy—All-India Debate Competition—Delhi

7. Championship Trophy—All-India Debate Competition, Marwari Students Union, Calcutta.

1. Sri C. M. Rustomjee

2. Sri Dinesh Goswami

I should like to place on record my sincere gratitude to my colleagues and well-wishers without whose earnest co-operation the Debate Seminar of the Law College 1958-59 would not have been such a conspicuous success.

Pares Dev
Secretary (Debate)

MAGAZINE AND FORUM

It is a pride that we have been able to change the present title of the Magazine and to name it as 'Law Journal' from this year befitting the decorum of the day. We are also extremely lucky to bring into light this journal, as a volume commemorating the Golden Jubilee of our college.

We had to face this year innumerable practical difficulties, and at one stage they assumed such character and magnitude that there was no alternative left to us but to resign. But at the repeated requests of the authorities concerned we shouldered again the responsibilities connected with the publication of this Journal, and brought it out within the shortest possible time.

For the preparation and publication of this "Law Journal", we thank those for whom we are thankful.

Modhusudan Majumdar.
Shyam Sundar Agrawal.
Joint-Secretaries.

Report of the Hardinge Hostel

—1958-59—

It is hardly a hap that anybody is conversant with the University College of Law, but ignorant about the Hardinge Hostel. The glory of our College is abysmal and in fetching the same the contribution of the Hardinge Hostel is fairly large. Our Alma Mater has trained numerous illustrious sons of the soil. The class-lessons in the College did whet their intellect; but many of them, sheltered in this Hostel, took a caressing comfort and found an atmosphere congenial to the foliage of their faculties. So a solitary study of the achievements of our College without any reference to the Heaven in the Hardinge might rouse the megrim of a half-told tale.

While to the present generation unity is an ideal yet eluding and parochialism is a maudlin malaise our Hostel may well exhibit an apex of unity and a culmination of cosmopolitanism. Ours is a place where persons of different provinces do settle harping a paean of oneness. We have learnt well to steer unity amid the welter of diversity.

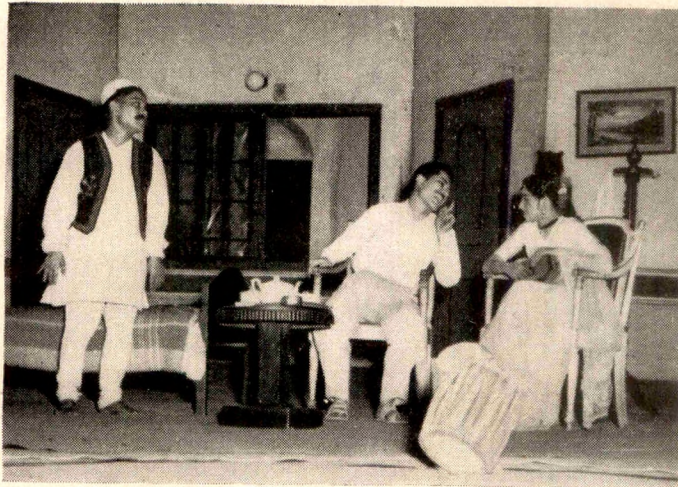
Our boarders are always wont to participate in the corporate life of the College. Several portfolios of the College Union are held by our boarder-brothers. Sri Giridhar Mukherjee is one of the two Assistant General Secretaries of the College Union. Sri Himadri Lahiri is a Joint Secretary to the Drama and Social Section and Sri Madhusudan Majumdar is one of the able editors of the College Magazine.

This year, the achievements of our boarders in various spheres have been too splendid to scout a seismic sensation. Sri Mukurkanti Khisa succeeding in the Indian Foreign Service Examination and Sri Ramshankar Jhawar standing second in the Intermediate C. A. Examination have bagged a national honour on our behalf. In the M.A. Examination of Calcutta University our boarders won three first classes. Sri Ashoke Das stood first class second in Ancient Indian History, Sri Kanailal Hazra, to his great credit, stood first class first in Pali and Sri Amal Mukhopadhyay stood first class first in political science. We are glad with a galaxy of chaste debaters among us. Sri D. T. Bhutia stood first in the debate competition held in the Netaji Subhas Institute and also in the Inter-Hostel Debate Competition organised by the Poddar Chhatra Niwas. Sri Pranab Kumar Ganguli was one in the team to win the Champion's Trophy for our College in the All Bengal Inter-College Debate Competition held in Behrampur. He also stood second in the Inter-Hostel Debate Competition sponsored by the Y.M.C.A. Sri Mihir Sen proved his potentiality participating in a number of debates.

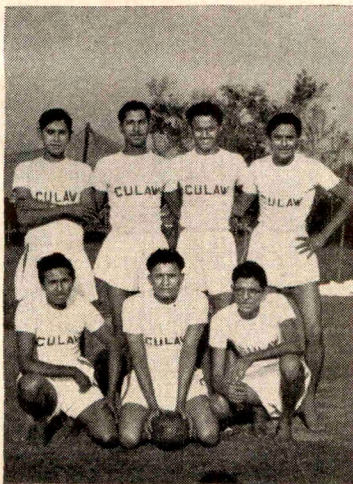
In the cultural affairs our boarders always take a keen interest. On the eve of the Puja vacation we arranged a musical soiree that laid well an imposing



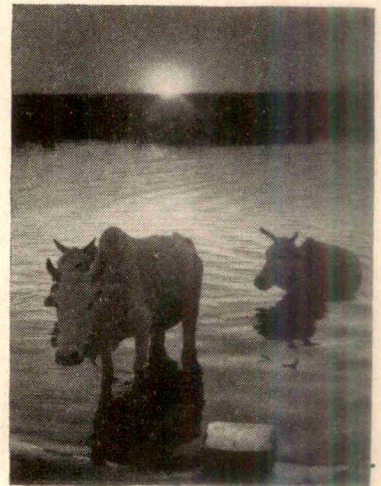
*A scene from
"Durabhashini"*



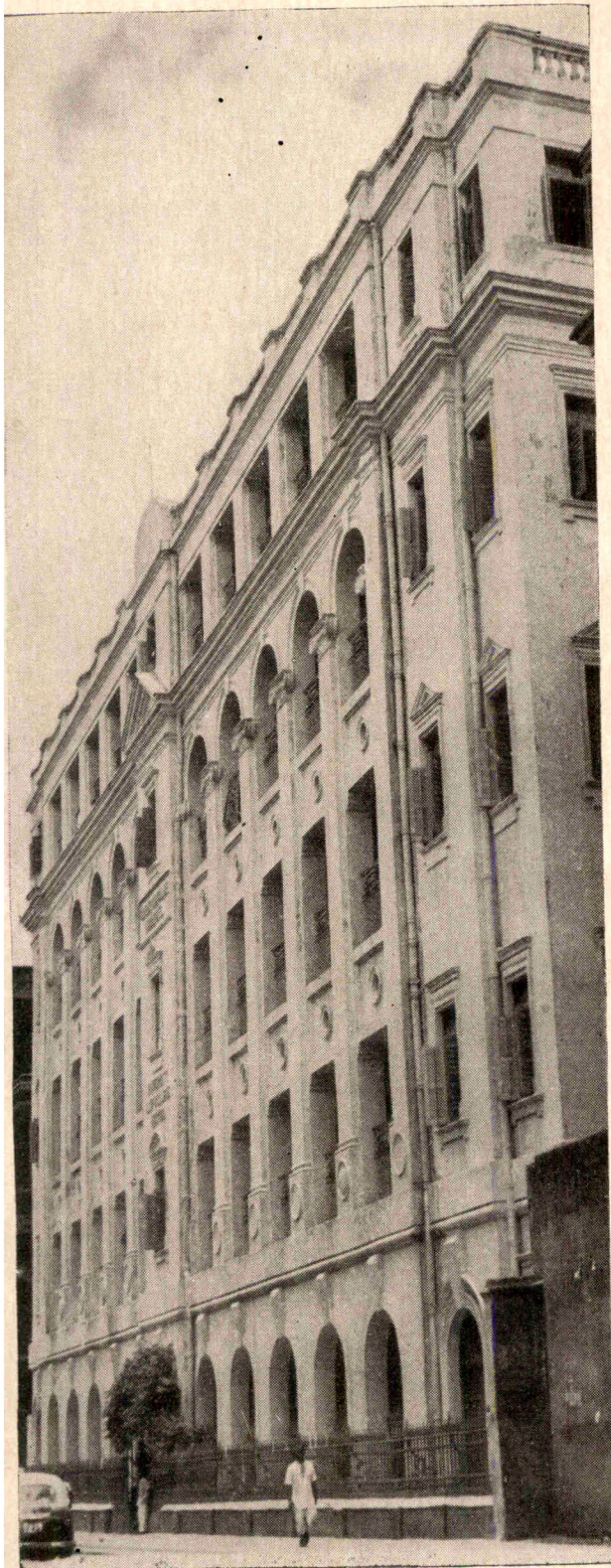
*A scene from
"Uljhan"*



*University Volley-ball
Knock-out Champion
—1958-59*



*"Home-wards"
—A. Brahma
(Third year student)*



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INDOOR GAMES



Chess

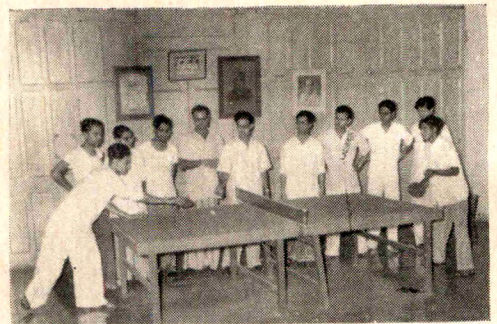


Table Tennis



Carrom

effect upon our minds. Sri Devprasad Mukherjee directed the annual drama held in Rangmahal and to his talent the success of that day might be safely ascribed. In the same performance Sri Asoke Kumar Baksi by his bright skill attained a wide applause.

For games and sports our boarders do cherish an abundant zeal. In the month of September under the supervision of Bikash Ghosh we arranged a table-tennis tournament as well as a carrom-competition and we enjoyed several evenings with our senses enthralled by the deft performance of the participants. Our O. P. Jalan represented the Law College to win the Volley-ball championship. Sri Mukti Ranjan Barooah and Sri Krishna Gopal Baldi won the champion's laurels in the Law College Badminton Championship. Sri Aditya Mukherjee got a prize for his Yogic Asana demonstration. Sri D. T. Bhutia is the capable captain of the Law College Hockey team.

This year the Saraswati Puja was duly celebrated in our Hostel with much enthusiasm and the cultural function arranged in this occasion was a pleasant success even in the teeth of natural disturbances. We owe all this to the honest effort of Sri Prabir Sarangi, Sri Anil Mukherjee, Sri Aditya Mukherjee, Sri Chittaranjan Betal, Sri Mrinal De Chowdhury, Sri Priya Nath Chakravarty, Sri Amal Chatterjee, Sri Barun Deb, Sri Dipak Mitra, Sri Ajit Sengupta, Sri Sunil Das and Sri Giridhar Mukherjee.

While preparing this report we find a right occasion to draw the attention of the authority to certain basic needs in our Hostel. This year we beheld the bliss of official messing run by the boarders' representatives. But as yet there is no systematic scheme of messing in our Hostel. We request the authority to frame up a permanent scheme of messing in consultation with the boarders' representatives. We are sorry to say that in such a big hostel like ours there is no sick-ward. While diseases occur very often and most of the boarders are at a long distance from their homes they are to meet too much trouble because of the absence of a sick-room. We regret to reiterate that as yet no telephone-booth has been installed in our Hostel. We earnestly request the authority to meet this long-felt need. Again everybody is dissatisfied with the visitors' room. It is so narrow, dark and dusty as to readily remind a troglodytic residence.

In fine, we record with deep reverence our appreciation of the fostering care of our Principal Dr. P. N. Banerjee and the affection of our beloved Superintendent Sri Sadhan Ray Chaudhury and Deputy Superintendent Sri Mrityunjay Basu. Further it would be unfair if we fail to accord our heartiest thanks to Sri Anath Bandhu Samadar, Sri Arun Datta and Sri Chandrakanta Mukherjee whose active co-operation is an asset of ours.

Amal Mukhopadhyay, (*Chairman, Ward IV*).

Sunil Das, (*Chairman, Ward III*).

Prabir Sarangi, (*Chairman, Ward V*).

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lawyers	lawers	5	53	L

ADDENDUM

Reference of M/s. Raman and Raman Ltd. in "A Practical Study on Delegated Legislation" at P. 6, Line 21, Col. R. : A1959 S.C. 694.

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